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In the Supreme Court of the United States

OCTOBER TERM, 1977

FRANK P. NORTH, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Frank P. North, Jr., the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on ~~March 21, 1978.~~ Dec. 12, 1977. (?)

Opinions Below

The opinion of the United States Court of Appeals is unreported and is printed in Appendix D of the Joint Appendix filed herewith by the petitioner, and by four other simultaneous petitioners (Robert Craig, Louis A.

Markert, Jack E. Walker and Peter V. Pappas), at pages App. 59-151 of the Joint Appendix. The judgment of the United States Court of Appeals is printed in Appendix E at page App. 152 of the Joint Appendix.

Jurisdiction

The opinion and decision of the United States Court of Appeals was entered on December 12, 1977 (App. D, pages App. 59-151 of Joint Appendix). A timely petition for rehearing was denied on March 21, 1977 (App. E, page App. 152 of Joint Appendix). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether this Court should reconsider and abandon the established precedent of *Dunn* v. *United States*, 284 U.S. 390 (1932), which permits a legally and factually inconsistent verdict in a criminal prosecution upon a multi-count indictment.

2. Whether the questions presented by three other simultaneous petitioners (Robert Craig, Jack E. Walker and Peter V. Pappas), to the extent applicable to this petitioner, should be reviewed on writ of certiorari. (Petitioner, in the interest of avoiding duplication, respectfully asks for permission to adopt the petitions of those three other petitioners, except to the extent their questions presented are not applicable to him.)

Statutes Involved

The statutes involved are the 3 provisions of Title 18, United States Code, cited in the indictment. 18 U.S.C. §371 provides:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud

> the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> "If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor".

18 U.S.C. §1341 provides:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

18 U.S.C. §1952(a) provides:

> "(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both."

Statement of the Case

The facts material to consideration of the questions presented, and the basis for federal jurisdiction in the court of first instance, are adequately summarized in the opening part of the opinion of the United States Court of Appeals (App. D, pages 59-80 of Joint Appendix).

Reasons for Granting this Writ

Upon the question now presented by petitioner, the Court of Appeals acted with dispatch (App. D, page App. 124 of Joint Appendix):

> "North also contends that the jury reached a legally and factually inconsistent verdict with respect to him. This argument, however, has been rejected on previous occasions by this court, and we reject it here. *E.g. United States* v. *Serbins,* 538 F.2d 737, 747 (7th Cir. 1976); *United States* v. *Greene,* 497 F.2d 1068, 1085-86 (7th Cir. 1974); *United States* v. *Tankersley,* 492 F.2d 962 (7th Cir. 1974)."

That conclusion, as does the same conclusion reached by numerous federal judges in the past 46 years, finds its origin in the established precedent of *Dunn* v. *United States,* 284 U.S. 390 (1932), in which Mr. Justice Holmes delivered the opinion of the Court (excerpt at 393-394):

> "Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment. *Latham* v. *The Queen,* 5 Best & Smith 635, 642, 643. *Selvester* v. *United States,* 170 U.S. 262. If separate indictments had been presented against the defendant for possession and for maintenance of a nuisance, and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as *res judicata* of the other. Where the offenses are separately charged in the counts of a single indictment the same rule must hold. As was said in *Steckler* v. *United States,* 7 F.(2d) 59, 60:
>
> 'The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were

> not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.'
>
> "Compare *Horning* v. *District of Columbia*, 254 U.S. 135.
>
> "That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters."

It is the position of petitioner, a position recognized by persuasive authority, that the *Dunn* precedent has been stripped of its foundation, is an incorrect rule of law and, to promote federal criminal jurisprudence, should be discarded in favor of the dissenting view of Mr. Justice Butler in *Dunn* (at 407):

> "The law does not permit investigations into the deliberations of juries for ascertainment as a matter of fact upon what considerations verdicts are reached; the soundness of that rule has never been questioned. There are stronger reasons against speculating whether, or assuming that, the jury through tenderness of disposition, mercy or forbearance acquitted while knowing that its duty was to convict the accused. Conflict between the findings may not be explained. The inference that the jury, seeking rightly to discharge its duty, made a mistake, is to be preferred over the suggestion that it found for defendant upon an assumption of power it might not lawfully exert."

Two *res judicata* rulings by this Court reveal the absence of any substantive foundation for the rule established by the *Dunn* majority. In *Sealfon* v. *United States*, 332 U.S. 575 (1948), this Court ruled that an earlier acquittal of conspiracy provided a complete *res judicata* de-

fense to a later prosecution for the related substantive offense, under the circumstances presented (at 580):

> "So interpreted, the earlier verdict precludes a later conviction of the substantive offense. The basic facts in each trial were identical. . . . It was a second attempt to prove the agreement which at each trial was crucial to the prosecution's case and which was necessarily adjudicated in the former trial to be nonexistent. That the prosecution may not do."

The second ruling is *Ashe* v. *Swenson*, 397 U.S. 436 (1970), which involved multiple robbery-theft charges and trials arising from an alleged single robbery of multiple victims (and an incidental car theft). In *Ashe* this Court extended "collateral estoppel", as part of the guaranty against double jeopardy, to state prosecutions. The issue in *Ashe*, as stated by Mr. Justice Stewart for the majority, was ". . . simply whether, after a jury determined by its verdict that the petitioner was not one of the robbers, the State could constitutionally hale him before a new jury to litigate that issue again" (at 446).

While *Sealfon* and *Dunn* demolish the *dictum* of Mr. Justice Holmes which supports the *Dunn* precedent, relative to *res judicata*, those later rulings do not reach the question at bar, whether *Dunn* itself should be preserved or abandoned. That issue was explored at length in an article entitled "Inconsistent Verdicts in a Federal Criminal Trial", 60 Col. Law Rev. 999 (1960),[1] and its author concluded (at 1009):

> ". . . The several cases that have held that *Sealfon* does not affect *Dunn* because collateral estoppel cannot apply at a single trial, seem to have overlooked that any connection between the two cases inheres in the state-

[1] The article also demonstrates the great disparity among state courts upon this issue. Footnote 18 on pages 1002-1004. See also an annotation at 18 ALR 3d 274-282.

ment in *Dunn* that the rule of consistency for consecutive criminal actions must apply to single trials of multiple counts. The Court in *Dunn* seemed to think that the joinder of counts for the convenience of trial should confer on the defendant no greater rights than those he would have if the counts were tried separately. Since *Sealfon* effectively prevents a conviction that is inconsistent with a prior acquittal, continued alherence to *Dunn* deprives the defendant of a right he would have if the counts had been tried separately. The underlying principle of *Dunn* suggests that the specific conclusion there reached should no longer be followed, so that a defendant in a multiple count trial will have rights equal to those of a defendant successively tried. It is not unlikely, therefore, in view of the *Sealfon* decision, and because of the failure of the consideration of jury leniency to provide any effective support for *Dunn*, that the Supreme Court will refuse to adhere to that decision when the question is again presented."

Compare similar conclusions in "*Ashe* v. *Swenson:* Collateral Estoppel, Double Jeopardy, and Inconsistent Verdicts", 71 Col. Law Rev. 321 (1971), at 334.

The issue whether or not to follow *Dunn* was addressed to the Supreme Court of Alaska in *DeSacia* v. *State,* 469 P.2d 369, 370-381 (Alaska, 1970), and the 5 Supreme Court Justices were unanimous in their repudiation of *Dunn* and its progeny. The Court instead, upon analysis of the federal rule, decided that the verdict must be rational (at 377-378):

> ". . . Although the assertion that juries have traditionally not been required to render consistent verdicts is itself subject to some doubt, our disagreement with the logic underlying the federal rule on inconsistent jury verdicts is not of a historical nature. Rather, we can see no basis to assume, as was assumed in *Dunn,* that inconsistent verdicts are the product of a jury's disposition toward treating the accused leniently; nor can we see a basis for assuming that, in allowing inconsistent jury verdicts in criminal trials to stand, we run only 'the risk that an occasional conviction may have been the result of compromise.' The truth is simply that we do not know, nor do we have any way of telling, how many inconsistent verdicts are attributable to feelings of leniency, to compromise, or, for that matter, to outright confusion on the part of the jury.
>
> • • •
>
> ". . . As a matter of fact it might be possible to speculate indefinitely as to what paths the jury followed in reaching its conclusions in this case. The point is that we have no reliable way to discover what really lies behind the inconsistent verdicts; and any conclusions—any assumptions on our part—would not be warranted.
>
> "What we do know, however, is that the verdict of the jury convicting DeSacia on count II of the indictment is inconsistent, and necessarily so, with the acquittal in count I. This result is irrational. In our system of criminal procedure, both at trial and on appeal, the entire focus of the fact-finding effort is upon a reasonable solution of factual issues. Accordingly, the language of our cases centers upon the element of reason. For example a jury will not be allowed to convict a person accused in a criminal matter unless it finds guilt to be established beyond a *reasonable* doubt. A trial court judge must enter a judgment of acquittal if he determines that fair-minded men cannot *reasonably* differ on the question of whether there is a *reasonable* doubt as to the defendant's guilt. We can conceive of no reason why, under these circumstances, we cannot require at the very least, a minimal degree of reasonableness in the rendering of jury verdicts."

The unchallengeable logic and substance of the *DeSacia* ruling merits full review by this Court, which alone can remove the bridle of *Dunn.* As Circuit Judge William H. Hastie expressed it, ". . . a judge of an inferior court

can do no more than express his hope that the rule of the *Dunn* case will soon be reconsidered and abandoned." *United States* v. *Vastine,* 363 F.2d 853, 855 (3d Cir., 1966, concurring opinion). See also the concurring opinion of Chief Judge David L. Bazelon in *United States* v. *Fox,* 433 F. 2d 1235, 1239 (D.C. Cir., 1970).

The case at bar presents a very appropriate vehicle for re-examination of the *Dunn* precedent. The verdict with respect to petitioner corresponded to the indictment in the following manner (Rec. 1, 224):

Count of Indictment	Alleged Violation	Alleged Dates	Verdict
1	Conspiracy to Commit Mail Fraud (18 U.S.C. §371)	Jan. 6, 1971 to Dec. 4, 1974	Guilty
2	Mail Fraud (18 U.S.C. §1341)	Nov. 18, 1971	Not Guilty
3	Mail Fraud	Nov. 18, 1971	Not Guilty
4	Mail Fraud	Nov. 18, 1971	Not Guilty
5	Mail Fraud	Dec. 28, 1971	Not Guilty
6	Mail Fraud	Mar. 24, 1972	Not Guilty
7	Mail Fraud	Mar. 24, 1972	Not Guilty
8	Mail Fraud	April 27, 1972	Not Guilty
9	Mail Fraud	May 1, 1972	Not Guilty
10	Mail Fraud	June 22, 1972	Guilty
11	Mail Fraud	June 23, 1972	Guilty
12	Mail Fraud	Sept. 28, 1972	Guilty
13	Interstate Travel to Promote Bribery (18 U.S.C. §1952)	Feb. 29, 1972	Not Guilty
14	Interstate Travel to Promote Bribery	Mar. 1, 1972	Not Guilty

A review of the basic evidence pertaining to petitioner reveals that rational consistency could only produce an identical verdict (acquittal or conviction) upon all 14 counts. See App. D, pages App. 117-118 of Joint Appendix. According to the evidence, the *only* mention of the "cement bill" to petitioner (before postal inspectors visited him on June 3, 1974) was by government witness Pete Pappas, who testified about their conversation shortly before the meeting of the Illinois Motor Vehicle Laws Commission on November 8, 1971, possibly while they were drinking at the Mansion View: "I told him that I had something going on the cement bill and it was going to be in the Commission meeting. He said, 'Fine'" (Tr. 1065-1068). The prosecution evidence next discovered and touched petitioner more than 10 months later. According to witness Pappas, he telephoned petitioner (an extremely close friend, according to the evidence, with pressing financial needs because of an intensively disputed re-election campaign) in the early or middle part of September, 1972 and "I told him of my call from Peter V. and then I told him that if he could make the meeting at the Coffeehouse, I would have something for him. He said he thought he could and I said okay, fine" (Tr. 1136). When witness Pappas and Donald Carpentier (another government witness) arrived at the Coffeehouse seveal days later, petitioner was inside and, per the testimony of Pappas: "We sat down, had a cup of coffee and just had sort of a general conversation while we were waiting for Peter V." (Tr. 1137). Both before and after witness Pappas handed $1,000 cash to petitioner that day, there was no conversation or other communication involving petitioner (with witness Pappas, or with witness Carpentier, or with anybody else) which in any way connected the $1,000 cash to the "cement bill". The only possible evidence of that connection in 1971 or 1972,

which at all involved petitioner, was the above evidence of his conversation with witness Pappas on or about November 8, 1971. Petitioner was therefore responsible from inception, or not at all.

The inconsistent verdict as to petitioner demonstrates confusion and prejudice by the jury, resulting from the government's rebuttal closing argument. See App. D, pages App. 120-125 of Joint Appendix. Indeed the Court of Appeals recognized that the jury was misinformed when "... the prosecutor stated a concededly erroneous version of that conversation: '... North was told by Pete Pappas 'there will be something for you on the cement bill,' or 'there is something for you on the bill,' ... North sought to no avail to have the trial judge correct this misstatement" (App. D, page App. 122 of Joint Appendix). Acting upon such uncorrected and crucial misinformation, at the end of a nearly 10-week trial, the jury deliberated for 3 days and then returned a verdict which, as to North, is neither rational nor consistent.

Petitioner respectfully requests this Court to reconsider and abandon *Dunn*, and to reverse his conviction.

Respectfully submitted,

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JOINT APPENDIX

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APPENDIX A

UNITED STATES DISTRICT COURT
Northern District Of Illinois
Eastern Division

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT CRAIG, et al.,

Defendants.

No. 74 CR 877

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on defendants Craig and Markert's Motion to Dismiss. In support of their motion they assert their right to claim the privilege of Speech or Debate enunciated in Article I, Section 6 of the United States Constitution and argue that this privilege bars their prosecution under the present indictment.

Article I, Section 6 provides in pertinent part that:

> ". . . for any Speech or Debate in either House, (The Senators and Representatives) shall not be questioned in any other Place."

The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal benefit of legislators, but to protect the integrity of the legislative process by insuring the independence of individual legislators. *United States* v. *Brewster,* 408 U.S. 501, 507 (1971).

The Clause should be read broadly to include anything generally done in a session of Congress by one of its members in relation to the business before it. *Kilbourn* v. *Thompson,* 103 U.S. 168 (1880). It was further held in *United States* v. *Johnson,* 383 U.S. 169 (1966) that the privilege protects Members of Congress from inquiry into legislative acts or the motivation for actual performance of legislative acts. Defendants assert that under these holdings they are immune from prosecution, since the Government is precluded from inquiring into the legislative process.

Defendants urge that the Speech or Debate Clause of the United States Constitution has been extended to the states, and that as state legislators they are entitled to its protections. Defendants place initial reliance on *Kilbourn, supra.* In that case defendants were members of the House of Representatives who had conducted a hearing in which plaintiff was adjudged guilty of contempt of Congress. Plaintiff was imprisoned briefly, after which he brought suit against those Congressmen involved. The Supreme Court held that the Congressmen's conduct was protected by the Speech or Debate Clause of the United States Constitution. In the course of its lengthy opinion, the Court made the following statement:

> "*Mr. Justice* Story, Section 866 of his Commentaries on the Constitution, says: 'The next great and vital privilege is the freedom of speech and debate, without which all other privileges would be comparatively unimportant or ineffectual. This privilege also (he says) is derived from the practice of the British Parliament, and was in full exercise in our colonial legislation, and now belongs to the legislation of every State in the Union as a matter of constitutional right.' " (103 U.S. at 204)

Defendants interpret this statement as a clear showing that the federal Speech or Debate Clause had been extended to state legislators. The Government disagrees, simply labelling it as broad dicta.

After seventy years of silence on the subject, the Supreme Court again had an opportunity to address itself to this issue in *Tenney* v. *Brandhove,* 341 U.S. 367 (1951). Defendant Tenney, a California state legislator, was sued under the Civil Rights Act of 1871. Plaintiff alleged that defendant had misused his legislative authority for the improper purpose of depriving him of his constitutional rights in contravention of 8 U.S.C. §§ 43 and 47(3).

After extensive discussion of the historical development of the legislative Speech or Debate privilege, the Court held that the District Court had properly dismissed the complaint, stating:

> "We conclude only that here the individual defendants and legislative committee were acting in a field where legislators traditionally have power to act, and that the statute of 1871 does not create civil liability for such conduct." (341 U.S. at 379)

Like the defendants here, some federal courts have understood the holding in *Tenney* to mean that the federal Speech or Debate privilege had been extended to state legislators, at least in the context of a civil suit. *See Eslinger* v. *Thomas,* 476 F.2d 225 (4th Cir. 1973); *Gambocz* v. *Subcommittee on Claims,* 423 F.2d 674 (3rd Cir. 1970).

In 1971 the issue was clouded by the Supreme Court's ruling in *United States* v. *Brewster, supra.* In a cryptic footnote, the Court said of *Tenney,* "(Harassment of witness by state legislator during a legislative hearing; not a Speech or Debate Clause case.)"

The Court has examined the relevant cases and concludes that defendants incorrectly interpret the few authorities on the subject. A close examination of the *Tenney* opinion reveals that the Supreme Court never reached the issue of whether federal privilege should be extended to the states.

The bulk of the opinion traces the historical development of legislative privilege. Reasons for existence of the privilege were examined, as were various legislative codifications of the privilege from the English Bill of Rights in 1689 through the constitutions of the United States and various states. The Court concluded that in view of the importance attached to legislative privilege through the centuries, Congress could not have intended to strip any legislator of that privilege by enactment of the Civil Rights Act of 1871.

It was in this context that the Court made the statement relied on by defendants:

> "Did Congress by the general language of its 1871 statute mean to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Governments here? Did it mean to subject legislators to civil liability for acts done within the sphere of legislative activity? Let us assume, merely for the moment, that Congress has constitutional power to limit the freedom of State legislators acting within their traditional sphere. That would be a big assumption. But we would have to make an even rasher assumption to find that Congress thought it had exercised the power." (341 U.S. at 376)

In the opinion of this Court the decision in *Tenney* did *not* rest on any extension of the federal Speech or Debate Clause. Instead, the Supreme Court merely concluded that Congress had not intended the Civil Rights Act to limit

any Speech or Debate privilege to which a state legislator might be entitled by virtue of his state constitution. Thus, under this Court's reading of *Tenney*, that case did not extend federal Speech or Debate protection to state legislators under any circumstances.

This interpretation is reinforced by the footnote found in *Brewster, supra,* in which *Tenney* was said not to be a Speech or Debate Clause case. *See also United States* v. *Johnson, supra.* There the Court said of the *Tenney* opinion, "it viewed the state legislative privilege as being on a parity with the similar federal privilege." (383 U.S. at 180).

Having distinguished *Tenney,* the Court finds that *Kilbourn* v. *Thompson, supra,* is the only case in which the Supreme Court appears to have expressed an opinion on this issue. It was in the context of the Court's lengthy examination of the scope of legislative privilege that reference was made to *Mr. Justice* Story's Commentaries. It is this Court's opinion that this lone statement was gratuitously included in a very general discussion of the subject of speech or debate, and that as such it is pure dicta. This conclusion is reinforced by the fact that Article I of the United States Constitution deals exclusively with powers of Congress and that Section 6 clearly refers only to Senators and Representatives of the United States Congress.

This Court holds that the Speech or Debate Clause of the United States Constitution has never been nor should it now be extended to the states.

This, however, is not dispositive of defendants' motion. As members of the Illinois Legislature, they are protected by a comparable Speech or Debate privilege found in Article 4, Section 12 of the Illinois Constitution of 1970. That Clause provides that:

> ". . . A member (of the General Assembly) shall not be held to answer before any other tribunal for any speech or debate, written or oral, in either house. . ."

This Court cannot accept the Government's contention that defendants may not avail themselves of this state constitutional privilege in a federal criminal prosecution. The Government relies on Rule 26 of the Federal Rules of Criminal Procedure, which provides in pertinent part:

> "The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

The cases cited by the Government all relate to instances where state rules pertaining to evidence and competency of witnesses gave way to the federal rules. The Court rejects the Government's contention that when a defendant enters a federal courtroom, he is stripped of all state-endowed constitutional privileges. As was pointed out in *Tenney,* assuming that Congress has the *power* to deprive state legislators of a privilege otherwise available to them, this Court will not ascribe to Congress an intent to do so in the absence of a clear showing to that effect.

Having decided that defendants may avail themselves of the Illinois constitutional Speech or Debate privilege, it must be determined whether that privilege operates to bar inquiry into the present charges. This Court will look to the decisions which have defined the scope of the federal Speech or Debate Clause, since the federal and state privileges have the same historical purpose.

Defendants rely on *United States* v. *Johnson, supra.* In that case it was held that defendant Congressman, charged with conspiring to defraud the United States by conspiring

to make a speech for compensation, was protected from prosecution by the Speech or Debate Clause. *Mr. Justice* Harlan, speaking for the Court, stated:

> "However reprehensible such conduct may be, we believe the Speech or Debate Clause extends at least so far as to prevent it from being made the basis of a criminal charge against a Member of Congress of conspiracy to defraud the United States by impeding the due discharge of government functions. The essence of such a charge in this context is that the Congressman's conduct was improperly motivated, and as will appear that is precisely what the Speech or Debate Clause generally forecloses from executive or judicial inquiry." (383 U.S. at 180)

The Court concluded that prosecution under a general criminal statute dependent on such inquiries necessarily contravenes the Speech or Debate Clause. However, the Court went on to say:

> "Our decision does not touch a prosecution which, though as here founded on a criminal statute of general application, does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them." (383 U.S. at 185)

The Court further held that it was not necessary to dismiss the conspiracy count in its entirety. Instead, it was held that with all references to that aspect of the conspiracy eliminated, the Government should not be precluded from a new trial on that count, thus wholly purged of elements offensive to the Speech or Debate Clause.

In *United States* v. *Brewster,* the defendant was a former United States Senator charged with accepting a bribe in exchange for a promise relating to an official act. The Court held that the Speech or Debate Clause did not bar prosecution. *Mr. Chief Justice* Burger, speaking for the Court, observed:

> "Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. It is not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator. It is not an 'act resulting from the nature, and in the execution, of the office.' Nor is it a 'thing said or done by him, as a representative, in the exercise of the functions of that office,' 4 Mass., at 27. Nor is inquiry into a legislative act or the motivation for a legislative act necessary to a prosecution under this statute or this indictment. When a bribe is taken, it does not matter whether the promise for which the bribe was given was for the performance of a legislative act as here, or as in *Johnson*, for use of a Congressman's influence with the Executive Branch. And an inquiry into the purpose of a bribe 'does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them.' 383 U.S., at 185." (408 U.S. at 526)

Defendants here are charged with interference with commerce by threats or violence (extortion) and mail fraud. Following the reasoning in *United States* v. *Brewster, supra*, this Court holds that prosecution is not barred by the Illinois Speech or Debate privilege in this case. Extortion and mail fraud are in no conceivable way part of the legislative process. Nor is it necessary to inquire into the legislative process in the course of prosecution.

Paragraphs 1 through 5 and paragraphs 14 and 15 of defendants' motion allege in essence that the indictment is uncertain, that it fails to sufficiently aver a crime, and that it fails to set forth the essential facts constituting the offenses charged. The Court finds that the indictment sets forth the elements of the offenses with sufficient particularity, that it apprises defendants of the charges against them, and that they will be able to plead a judgment on it as a bar to further prosecution for the same offenses.

Defendants' remaining arguments appear to challenge the inclusion of certain Illinois statutes in the indictment. The Court holds that this does not affect the sufficiency of the indictment.

Defendants' Motion to Dismiss is denied.

Enter: /s/ *Alfred Y. Kirkland*
Alfred Y. Kirkland, Judge

Dated: Mar 13 1975

UNITED STATES DISTRICT COURT
Northern District Of Illinois
Eastern Division

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT CRAIG, et al.,

Defendants.

No. 74 CR 877

ORDER

This matter comes before the Court on defendant Markert's Motion to Suppress Evidence. Defendant argues that testimony given by him to the Grand Jury was obtained from him in violation of the Speech or Debate Clauses of the Constitutions of the United States and Illinois. The Court recognizes that defendant is entitled to the protection of the Illinois Speech or Debate privilege. Pursuant to that privilege, the Government is precluded from inquiring into legislative acts or defendant's motives in performance of legislative acts.

Defendant has been provided with a copy of his Grand Jury testimony pursuant to his rights under local rule 2.04. This Court directs defendant to present to the Court a concise written statement of what evidence, if any, was taken from him in violation of his constitutional privilege. His motion shall be briefed and filed within 10 days after entry of this order. The Government shall respond with a brief in opposition within 10 additional days. Defendant shall reply to the Government's brief within 5 additional days.

Enter: /s/ *Alfred Y. Kirkland*
Alfred Y. Kirkland, Judge

Dated: March 17, 1975

UNITED STATES DISTRICT COURT
Northern District Of Illinois
Eastern Division

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT CRAIG, et al.,

Defendants.

No. 74 CR 877

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on motion by defendant Markert to suppress evidence. Defendant, a former member of the Illinois General Assembly, argues that certain evidence, including grand jury testimony, was taken from him in violation of the Illinois Speech or Debate Clause. This evidence was submitted to the Court for *in camera* inspection.

Defendant agreed to several interviews and testified before a federal grand jury. At all relevant times defendant was represented by counsel and was given a standard warning concerning his constitutional rights. The government asserts that the Speech or Debate privilege is personal in nature and that defendant waived this privilege when he agreed to give testimony after having been advised of his rights. Defendant argues that the privilege is a complete bar to inquiry which may not be waived by an individual.

The threshold issue is whether the Illinois Speech or Debate Clause accords a personal privilege which may

effectively be waived by an individual legislator. This Court is of the opinion that it may not be so waived.

Article 4, Section 12 of the Illinois Constitution of 1970 provides in pertinent part that:

> . . . A member [of the General Assembly] shall not be held to answer before any other tribunal for any speech or debate, written or oral, in either house. . .

There is little available case authority pertaining to the Illinois Speech or Debate Clause. Accordingly, since the state and federal privilege have a common historial origin and purpose, the Court will look to those decisions which bear on the federal privilege. The comparable federal privilege is found in Article I, Section 6 of the United States Constitution:

> . . . for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place.

Although the scope of the federal Speech or Debate Clause has been examined at length by the Supreme Court, there has never been a definitive ruling on the issue now before this Court.

In *United States* v. *Johnson,* 383 U.S. 169 (1966), the Supreme Court was faced with a constitutional challenge to the indictment of a United States Congressman who allegedly had abused his position by conspiring to give a particular speech in return for payment from private interests.

Mr. Justice Harlan noted that: ". . . the language of the Speech or Debate Clause clearly proscribes at least some of the evidence taken during trial". (383 U.S. at 173) The Court quoted with approval from *Tenney* v. *Brandhove,* 341 U.S. 367, 377 (1951), stating:

> . . . that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned. (383 U.S. at 180).

The Court reasoned that despite the reprehensible nature of the charged conduct, the Speech or Debate Clause operated to prevent it from being made the basis of a charge relating to legislative acts. The Court observed:

> The essence of such a charge is that the Congressman's conduct was improperly motivated, and as will appear that is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry. (383 U.S. at 180)

Because the Court found that the government's case could be made without reference to legislative acts, the indictment itself withstood attack. However, the Court took care to point out that any prosecution dependent on inquiry into legislative activity necessarily *contravened* the Speech or Debate Clause, and the Court directed the government to prosecute its case without reference to such forbidden area of inquiry.

It is significant that nowhere in *Johnson* did the Court suggest that the Speech or Debate privilege was available at the option of a legislator. The opinion reflects the apparent conclusion that the Clause operates to *foreclose judicial inquiry* into legislative activity.

In *United States* v. *Brewster,* 408 U.S. 501 (1972), the issue before the Court was whether the defendant Senator could be prosecuted on the charge that he had accepted a bribe in exchange for a promise relating to an official act. The Court held that the Speech or Debate Clause operated to bar inquiry into legislative acts, and since such a prosecution was not necessarily dependent on such inquiry, prosecution was barred.

The Court in both *Johnson* and *Brewster* quoted with approval from *Ex Parte Wason,* L.R. 4 Q.B. 573 (1869):

> I am clearly of opinion that we ought not to allow it to be doubted for a moment that the motives or intentions of members of either House *cannot be inquired into* by criminal proceedings with respect to anything they may do or say in the House. (emphasis added) (383 U.S. at 183, 408 U.S. at 509).

The language of the Supreme Court opinions and of the constitutional provisions themselves is plain. The privilege is invariably described in the opinions in terms of a prohibition against judicial or executive inquiry. Likewise, the directive in each of the two relevant constitutional provisions is not to the legislator, that he may avail himself of a privilege attendant upon elective office, but rather to those who would question him. It is said that the legislator "*shall not be questioned* in any other Place" and that he "*shall not be held to answer* before any other tribunal." The plain import of that language is not that the legislator may claim a privilege, but that the executive and judicial branches are prohibited from inquiring into legislative activities.

Such literal interpretation of constitutional language and that of the opinions is entirely consistent with the stated purpose of the Speech or Debate privilege. See *Kilbourn* v. *Thompson,* 103 U.S. 168 (1880); *United States* v. *Johnson, supra; United States* v. *Brewster, supra.*

In *Tenney* v. *Brandhove, supra,* the Court devoted a considerable portion of its opinion to a discussion of the origins and purpose of the privilege. *Mr. Justice* Frankfurter adopted the statement of James Wilson, a member of the Committee which was responsible for the federal Speech or Debate Clause:

> In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of everyone, however powerful, to whom the exercise of that liberty may occasion offense. (341 U.S. at 373)

The Court observed that it was necessary to insure that representatives be able to execute the functions of their office without fear of prosecutions. (341 U.S. at 373, 374) The Court concluded that:

> *Legislators are immune* from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence, but for the public good. (emphasis added) (341 U.S. at 377)

This principle was affirmed in *United States* v. *Johnson, supra,* where the Court stated that the purpose of the privilege was to "prevent intimidation by the executive and accountability before a possibly hostile judiciary." (383 U.S. at 181), and again in *Brewster:*

> The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators. (408 U.S. at 507)

The Court concludes, upon consideration of the relevant authorities, that it would defeat the purpose of the Illinois Speech or Debate Clause if an individual legislator could waive a protection which was personal to him. It is clear, in the opinion of this Court, based on the plain wording of the Illinois Speech or Debate Clause and on the language of Supreme Court opinions, that the privilege operates as a complete bar to inquiry into legislative activities. The Court holds that the privilege is not personal to a legislator

and may not be waived. The Speech or Debate Clause was designed to protect the legislative process and render it immune from intimidation. The fact that a legislator benefits from its protection does not alter the nature of the privilege.

The judicial or executive branches of government may not avoid this constitutional prohibition by the fortuitous expedient of obtaining the willing cooperation of a legislator, who chooses to volunteer information, thereby creating an inhibiting effect on the legislative activities of other members of the legislature. While there is nothing, as a practical matter, which can prevent a legislator from volunteering information on protected activities, the Speech or Debate Clause prohibits this Court from listening.

The Court having held that the Speech or Debate privilege may not be waived, the next issue for determination is which evidence, if any, was taken from defendant in violation of this privilege.

Looking to those Supreme Court cases which deal with the federal Speech or Debate Clause, certain guidelines have emerged.

In *Kilbourn, supra,* it was held that the privilege should be read broadly, to include not only words spoken in debate, but anything generally done in a session of the House by one of its members in relation to the business before it. (103 U.S. at 204) It was further stated in *Brewster, supra,* that the Speech or Debate Clause prohibits inquiry only into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts. (408 U.S. at 512) The Court there quoted with approval from *Coffin* v. *Coffin, supra* at 27:

> . . . and I would define the article as securing to every member exemption from prosecution, for everything said or done by him, as a representative, in the exercise of the functions of that office; without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules. (408 U.S. at 514)

In *Gravel* v. *United States,* 408 U.S. 606 (1972) the Court clarified the scope of the privilege, by stating that committee reports, resolutions, and the act of voting are equally covered.

As was made clear in *Brewster,* however, not all things "related to the due functioning of the legislative process" are shielded by the Clause. (408 U.S. at 513, 515). Thus, political activities must be dis"nguished from legislative activities.

To the extent that criminal activity is not part of the legislative process, it is not protected. This was the holding of the Supreme Court in *Johnson, supra.* The Court there stated:

> No argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no way related to the due functioning of the legislative process. (383 U.S. at 172)

This proposition was affirmed in *Brewster, supra,* where *Mr. Chief Justice* Burger, speaking for the Court, observed:

> Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. It is not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator. It is not an 'act resulting from the nature,

> and in the execution, of the office.' Nor is it a 'thing said or done by him, as a representative, in the exercise of the functions of that office,' 4 Mass., at 27. Nor is inquiry into a legislative act or the motivation for a legislative act necessary to a prosecution under this statute or this indictment. When a bribe is taken, it does not matter whether the promise for which the bribe was given was for the performance of a legislative act as here, or as in *Johnson,* for use of a Congressman's influence with the Executive Branch. And an inquiry into the purpose of a bribe 'does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them.' 383 U.S., at 185. (408 U.S. at 526)

The Court has carefully examined the transcript of defendant's grand jury testimony, as well as memoranda of three interviews conducted by postal inspectors and the United States Attorney's office.

Exhibit One is identified as a transcript of defendant's grand jury testimony. The Court is of the opinion that the following language is barred by the Speech or Debate Clause:

> On page 108, beginning with the question, "Are you familiar with . . ." through and including, on page 109, the answer, "To my recollection, no."
>
> Beginning on page 110, with the question, "Now you were a sponsor . . .", through and including, on page 113, the answer, "It was sometime . . . the introduction."
>
> Beginning on page 113, with the question, "And prior to that time . . .", through and including, on page 114, the answer, ". . . no, I have no recollection."
>
> Beginning on page 115, with the question, "And you are aware, are you not . . .", through and including, on page 116, the answer, "I am, yes."

> On page 122, beginning with the question, "Did you ever discuss . . .", through and including the answer, "I would assume . . . I would assume I did."
>
> Beginning on page 128, with the question, "Did you talk . . .", through and including, on page 129, the answer, "No; I was . . . service to the GA."
>
> On page 133, from the question, "Did you discuss . . ." through and including the answer, "I'm certain . . . can't say."

Exhibit Two is identified as a memorandum of an interview of defendant which was conducted on September 2, 1973 in rural Mt. Sterling, Illinois by two postal inspectors. The Court is of the opinion that the following language is barred by the Speech or Debate Clause:

> Beginning in paragraph 2 of page 2, "Mr. Markert was then asked who was . . ." through and including, in paragraph 1 of page 3, ". . . sponsored that particular bill."
>
> On page 3, "Markert stated that Pappas would . . . Department of Highways, etc."
>
> On page 4, "Mr. Markert then recalled . . . guarantee the outcome of this legislation."
>
> On page 4, "Markert was asked if . . . and other legislative business."
>
> On page 5, "He stated that the majority . . . legislation on individual bills."
>
> On page 5, "Markert related that . . . information on original bills."
>
> On page 5, "When asked if this type . . . was not commonplace either."
>
> On page 5, "Pappas stated that . . . relating to this bill."

On page 6, "Markert said at no time . . . any of the principles involved."

Exhibit Three is identified as a memorandum of a conversation which occurred on September 20, 1973 in Springfield, Illinois, between defendant and a member of the United States Attorney's office. The Court finds nothing within this memorandum which is privileged under the Speech or Debate Clause.

Exhibit Four is identified as a memorandum of an interview of defendant which was conducted on November 19, 1974 in Chicago, Illinois by a postal inspector and a member of the United States Attorneys' office. The Court is of the opinion that the following language is barred by the Speech or Debate Clause:

All of paragraph 3 of page 2, "'Mr. Holderman asked . . . Doris Steinberg about the bill."

In paragraph 4 of page 3, "He stated that he . . . would be assigned to him."

In paragraph 4 of page 4, "He said that he probably . . . interested in this bill."

In paragraph 4 of page 5, "Again, he stated that . . . or even kill it."

Order to be entered in accordance with this opinion.

Enter: /s/ *Alfred Y. Kirkland*
Alfred Y. Kirkland, Judge

Dated: May 23, 1975

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

No. 75-1592

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

ROBERT CRAIG, THOMAS J. HANAHAN and LOUIS A. MARKERT,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.

No. 74 CR 877

ALFRED Y. KIRKLAND, *Judge*

Argued September 26, 1975 — Decided January 5, 1976

Before CUMMINGS and TONE, *Circuit Judges,* and KUNZIG, *Judge.**

CUMMINGS, *Circuit Judge.* In December 1974, appellee Louis A. Markert, and co-defendants Robert Craig and Thomas J. Hanahan were indicted on two charges of

* Judge Robert L. Kunzig of the United States Court of Claims is sitting by designation.

political corruption. Count One alleged that while members of the Illinois House of Representatives they and their unindicted co-conspirator Pete Pappas allegedly extorted $1500 from members of the Illinois Car and Truck Renting and Leasing Association, inducing the payments "under color of official right" in violation of the Hobbs Act (18 U.S.C. § 1951). Count Two charged that the same individuals engaged in a scheme to defraud the citizens of Illinois of their "loyal, faithful and honest services in their official positions" and "of their right to have the legislative business of the State of Illinois conducted honestly" by accepting $1500 to block passage of a certain bill. The scheme was said to violate the Mail Fraud Statute (18 U.S.C. § 1341).

During the grand jury's investigation of alleged corruption in the Illinois General Assembly, the appellee consented to interviews with postal inspectors in September 1973 and to an interview with postal inspectors and an Assistant United States Attorney in November 1974. In addition, he testified under subpoena before the grand jury on September 13, 1973. At all times, appellee was represented by counsel and informed of his right to refuse to answer questions by asserting his Fifth Amendment privilege against self-incrimination. He declined, however, to invoke this privilege and answered all questions put to him by the postal inspectors, Assistant United States Attorney and before the grand jury.

In February 1975, Markert moved to suppress his grand jury testimony and the other statements he gave to government agents on the ground that they were obtained from him in violation of the federal and state Speech or Debate Clauses. A few weeks later, the district judge ruled that Markert was entitled to the protection of the privilege accorded by the Speech or Debate Clause of the Illi-

nois Constitution.[1] Consequently, the district court ordered Markert to provide "a concise written statement of what evidence, if any, was taken from him in violation of his [Illinois] constitutional privilege."

Subsequently, the district court handed down an unreported memorandum opinion and order granting Markert's motion to suppress certain portions of his grand jury testimony and parts of the interviews he gave to postal inspectors and the Assistant United States Attorney. The court decided that a legislator could not waive the privilege accorded by the Speech and Debate Clause of the State Constitution and "that the executive and judicial branches are prohibited from inquiring into legislative activities." The Government has appealed pursuant to 18 U.S.C. § 3731.

The primary question is whether state legislators have a Speech or Debate privilege, conferred either by the Illinois Constitution or as a matter of federal common law, which bars the admission of certain evidence against state legislators in a federal criminal prosecution. If so, we must then decide whether Markert waived that privilege.

I

The Federal Rules of Evidence became effective July 1, 1975.[2] Rule 501 is the pertinent rule and provides as follows:

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[1] In pertinent part, Article 4, Section 12, of the Illinois Constitution of 1970 provides:

> "* * * A member of the [General Assembly] shall not be held to answer before any other tribunal for any speech or debate, written or oral, in either house. * * *"

[2] Under *United States* v. *McCarthy*, 445 F.2d 587, 590-591 (7th Cir. 1971), this Court has applied these rules even before their effective date.

> "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

This version of Rule 501 does not alter the pre-existing criminal law in the federal courts. The standard embodied in the first sentence of Rule 501 was derived from Rule 26 of the Federal Rules of Criminal Procedure. See Senate Report No. 93-1277, 93rd Cong., 2d Sess., 4 U.S. Code, Cong. & Admin. News 7051, 7058 (1974); House Report No. 93-650, 93rd Cong., 2d Sess., 4 U.S. Code, Cong. & Admin. News, 7075, 7082 (1974). Rule 26 provided:

> "The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[3]

This rule was promulgated in 1944 (effective in 1945) as part of the Federal Rules of Criminal Procedure. Prior

[3] After the Federal Rules of Evidence were adopted in 1975, Rule 26 was amended to provide as follows:

> "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court."

to those rules, the law of evidence to be applied in federal criminal cases was uncertain. See Howard, Evidence in Federal Criminal Trials, 51 Yale L. J. 763 (1942). Neither state law nor federal law clearly applied. The governing statute, the Rules of Decision Act, provided that "the laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in Courts of the United States, in cases where they apply" (1 Stat. 92, now 28 U.S.C. § 1652). As interpreted by the Supreme Court, the statute required the federal courts in a criminal case to apply the law of the state in which the trial was held as it existed in 1789. *United States* v. *Reid*, 53 U.S. 361, 363. If the state was admitted to the Union after 1789, the common law as of the date of admission controlled. *Logan* v. *United States*, 144 U.S. 263, 303. These principles, however, were not strictly followed. At times, the Supreme Court examined state laws of evidence in the light of "general authority and sound reason," rejecting them where they were antiquated or inappropriate. *Benson* v. *United States*, 146 U.S. 325, 335; see *Rosen* v. *United States*, 245 U.S. 467. Finally in *Funk* v. *United States*, 290 U.S. 371, and *Wolfle* v. *United States*, 291 U.S. 7, the Court abandoned any strict adherence to state rules of evidence in criminal cases, adopting instead a flexible standard which would allow the federal courts to modify or disregard local laws of privilege "in the light of reason and experience." 291 U.S. at 12. These two cases were the basis for Rule 26. See Advisory Committee Notes to Rule 26; Vanderbilt, New Rules of Criminal Procedure, 29 A.B.A.J. 376, 377. Under Rule 26 the federal courts were free to fashion a federal law of evidence consistent with the Federal Rules of Criminal Procedure and Congressional statutes. See *Elkins* v. *United States*, 364 U.S. 206, 216; Cummings,

The Third Adventure, 29 A.B.A.J. 654, 655. As the 1940 Criminal Rules Enabling Act (18 U.S.C. § 3771) provided in pertinent part:

> "All laws in conflict with such rules [of criminal procedure] shall be of no further force and effect after such rules have taken effect."

The House Committee Report on Section 3771 showed that its purpose was to render it unnecessary to "search the common law, statutes, and constitutional provisions of the States * * *" (H. Rep. No. 2492, 76th Cong., 3d Sess., 2 (1940)), in determining the admissibility of evidence in criminal cases. Thus Rule 26 envisioned that the admissibility of evidence in criminal cases in federal courts would be governed by federal law and would not be dependent upon diverse state laws, including state constitutional provisions. *Elkins* v. *United States, supra,* 364 U.S. at 216; *Heathman* v. *United States District Court,* 503 F.2d 1032, 1034 (10th Cir. 1974).

Similarly, Rule 501 contemplates that "federal privilege law applies in criminal cases." Conference Report No. 93-1597, 93rd Cong., 2d Sess., 4 U.S. Code, Cong. & Admin. News 7098, 7100 (1974). However, nothing in the language of the rule or its legislative history indicates that courts are prohibited from recognizing as a matter of federal common law a speech or debate privilege for state legislators. The legislative history of Rule 501 was indeed stormy. The Supreme Court Advisory Committee's draft contained nine non-constitutional privileges (56 F.R.D. 234-256), and its proposed Rule 501 provided that only the enumerated privileges and those required by the federal Constitution or Act of Congress need be recognized by the federal courts (56 F.R.D. 230). This draft of Article V on Privileges aroused such furor when the Supreme Court submitted it to Congress that the House

Committee on the Judiciary eliminated the nine privileges in favor of the present Rule 501. This was done because the rules as submitted to Congress "contained controversial modifications or restrictions upon common law privileges." Senate Rep. No. 93-1277, *supra,* 4 U.S. Cong. & Admin. News 7058 (1974). With this background, surely there would have been a hint in the history of revised Rule 501 if Congress had intended to override the common law privilege inherent in the Speech or Debate Clause of the federal and state constitutions.

These rules mandate that we neither categorically reject nor accept the defendant's claim of a speech or debate privilege. Rather, we are instructed to determine whether "the principles of the common law * * * in the light of reason and experience" dictate the recognition of a federal common law speech or debate privilege to be applied in federal criminal prosecutions of state legislators. We hold that Markert has such a privilege.

A product of the 17th century struggle for parliamentary supremacy, legislative freedom of speech and debate "was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation." *Tenney* v. *Brandhove,* 341 U.S. 361, 372. The Speech or Debate Clause of the federal Constitution was adopted at the constitutional convention without discussion or dissent. See V Elliot's Debates 406 (1836 ed.); II Records of the Federal Convention 246 (Farrand ed. 1911). Most states have incorporated similar provisions in their constitutions. See *Tenney* v. *Brandhove, supra,* 341 U.S. at 373-375. And in its most recent cases, the Supreme Court has reaffirmed that the Speech or Debate clause is an essential tenet of the American political system. See *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491; *Doe* v. *McMillan,*

412 U.S. 306; *Gravel* v. *United States*, 408 U.S. 606; *United States* v. *Brewster*, 408 U.S. 501.

The clause originated, and its purpose remains, "to preserve the principle that the legislature must be free to speak and act without fear of criminal and civil liability." *Tenney* v. *Brandhove, supra,* 341 U.S. at 375. It is immaterial that the legislator may have had an unworthy motive. As Justice Frankfurter in *Tenney* (at 377):

> "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good."

This protection of the legislature's independence applies whether the judicial proceeding is civil or criminal. The privilege developed in England in response to the King's seditious libel prosecutions of dissident members of Parliament. See *United States* v. *Johnson, supra,* 383 U.S. at 181-183. Similarly, the Supreme Court has held that the clause applies to criminal prosecutions of members of Congress. *United States* v. *Brewster, supra; United States* v. *Johnson, supra.* The express purpose of the clause is to protect legislators "against possible prosecution by an unfriendly executive and conviction by a hostile judiciary" for their acts as legislators. *United States* v. *Johnson, supra,* 383 U.S. at 179. The clause therefore contains substantive and evidentiary elements. The content of a legislator's speech on the floor of the chamber or comment in Committee room cannot be made the basis of either civil (*Doe* v. *McMillan, supra,* 412 U.S. at 312; *Powell* v. *McCormack,* 395 U.S. 486, 502-503; *Dombrowski* v. *Eastland,* 387 U.S. 82, 85; *Tenney* v. *Brandhove, supra,* 367 U.S. at 377; *Kilbourn* v. *Thompson,* 103 U.S. 168, 203) or criminal liability. *Gravel* v. *United States, supra,* 408

U.S. at 624; *United States* v. *Brewster, supra,* 408 U.S. at 514; *United States* v. *Johnson, supra,* 383 U.S. at 180. Nor may legislators be required to answer questions about their legislative activities. *United States* v. *Brewster, supra,* 408 U.S. at 525; *United States* v. *Johnson, supra,* 383 U.S. at 183. In *Johnson,* the Court approved the English rule that "the motives or intentions of members of either House [of Parliament] cannot be inquired into by criminal proceedings with respect to anything they may do or say in the House." 383 U.S. at 183, quoting *Ex parte Wason,* L.R. 4 Q.B. 573, 577 (1869). Although construed broadly to protect any activity "generally done in a session of the House by one of its members in relation to the business before it" (*United States* v. *Johnson, supra,* 383 U.S. at 179; *Kilbourn* v. *Thompson, supra,* 103 U.S. at 204), the privilege does not apply to a criminal proceeding which "does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them." *United States* v. *Brewster, supra,* 408 U.S. at 510; *United States* v. *Johnson, supra,* 383 U.S. at 185.

Only the evidentiary aspect of the speech or debate privilege is involved in this appeal. Markert contends simply that he cannot be required to answer questions put to him by the grand jury and government officials if the inquiry delves into his conduct as a legislator on matters before the Illinois General Assembly. This evidentiary privilege is a necessary prophylactic. *United States* v. *Johnson, supra,* 383 U.S. at 182. Its purpose is the same as that of the substantive aspect of the Speech or Debate Clause: preservation of the independence of the legislature. *Id.*

The Government does not challenge this construction of the speech or debate privilege. It concedes that were it attempting to prosecute a member of Congress, he would enjoy the privilege Markert asserts in this case. The Government contends however that the privilege should apply only to questioning of legislators by co-equal branches of government. The policy served by the privilege, the Government argues, is separation of powers; because the national government is supreme, the privilege is inapplicable in this case.

This argument ignores the federal nature of the American system of government. The Constitution confers upon the national government only limited powers. Those powers not granted remain within the domain of the separate states. The reservation of power for the states is not only the import of the Tenth Amendment but also a basic understanding of the draftsmen of the Constitution. "The proposed Constitution, so far from implying an abolition of the State governments * * * leaves in their possession certain exclusive and very important portions of sovereign power. This fully corresponds, in every rational import of the terms, with the idea of a federal government." The Federalist, No. 9 at 76 (New American Library Ed. 1961).

The role of the states under the new federal constitution was also a central issue in the ratification debates. Opponents claimed that the new national government would soon engulf the states, eliminating all of their power and control over local affairs. See II Elliot's Debates, *supra* at 308 (New York), at 469 (Pennsylvania); III Elliot's Debates, *supra* at 171 (Virginia). Yet in state

after state speakers arose to assure their fellow delegates that the Constitution would work no such change; the states would remain an important unit of the government. See II Elliot's Debates, *supra* at 168 (Massachusetts), at 199 (Connecticut); IV Elliot's Debates, *supra* at 316 (South Carolina). The Constitution creates a federal system of government; people are subject to two sets of laws, those of the national government and those of the states. The essence of this federal structure is that on matters of national importance, the Congress shall legislate; on matters of local concern, the state legislatures shall enact the laws. See The Federalist No. 38, *supra;* Grant, The Nature and Scope of Concurrent Power, 34 Columbia L. Rev. 995 (1934). Therefore, state legislatures acting within the scope of their powers perform a function as vital to the governance of the state as the role Congress fulfills with regard to the nation as a whole.

Although the speech or debate privilege embraces notions of the separation of powers among co-equal branches of government, its primary message is that legislatures must be able to discharge their lawful responsibility in an atmosphere free from the threat of interference by other governmental units. A legislator in considering whether to support or oppose a proposed law must be free to reflect on the merits; he must not be deterred from advocating a position by the threat of prosecution by a hostile executive. The evil is the fact of deterrence; whether the threat emanates from the local or national executive makes no difference.

In the present case, the United States Attorney commendably conceded at the oral argument that a refusal to recognize a speech or debate privilege for state legislators

would have an inhibiting effect on the conduct of members of the Illinois General Assembly. This threat to the legislature's independence is fundamentally inconsistent with the idea of legislative action reflected in the policy, purpose and history of the privilege and inherent in the words: "for any Speech or Debate in either House, they shall not be questioned in any other Place." U.S. Const. Art. 1 § 6. Deterring a legislator from advancing a point of view, or influencing how he votes by requiring him to explain his motives before a grand jury is precisely the evil the speech or debate privilege intends to prevent. The protection of the First Amendment does not ameliorate this threat to legislative independence. The protection of freedom of speech does not provide a privilege against giving evidence. *Branzburg* v. *Hayes*, 408 U.S. 665. It does not prohibit a jury from questioning the motives of the speaker. See *New York Times Co.* v. *Sullivan*, 376 U.S. 254. Therefore, it would not be an adequate substitute for the speech or debate privilege. Thus, in view of the purposes of the speech or debate privilege, its common law history, and the important role of the states in governing the country, we hold that state legislators are entitled to a federal common law speech or debate privilege applicable in federal criminal prosecutions. The privilege is simply too important to our conception of government to be abolished by judicial fiat in a federal criminal prosecution under a statute of general applicability.[4] The concurring opinion

[4] The Hobbs Act (18 U.S.C. § 1951) and the Mail Fraud Statute (18 U.S.C. § 1341) are not narrowly drawn attempts by Congress to regulate the conduct of state legislators. These statutes therefore provide no compelling federal interest which requires us to consider whether the privilege may be abrogated by Congress.

herein incorrectly, we believe, assumes that the existence of this privilege is dependent on any underlying immunity.[5]

Principles of federal-state comity—"a proper respect for state functions" (*Younger* v. *Harris*, 401 U.S. 37, 44) —reinforce our conclusion that this particular privilege was not rescinded by the Federal Rules of Evidence. Perhaps somewhat idealistically, the Court in *Tenney* v. *Brandhove*, *supra*, 341 U.S. at 378, stated that legislative abuses were to be corrected by self-discipline and the electorate. Subsequently, in *United States* v. *Brewster*,

[5] The concurring opinion argues that because state legislators have no official immunity from federal criminal prosecutions, they should likewise have no privilege. But the evidentiary privilege conferred on members of Congress follows not from any substantive immunity but from the Speech or Debate Clause itself. A member of Congress is not immune from prosecution on charges of bribery or conflict of interest. *United States* v. *Brewster*, *supra*; *United States* v. *Johnson*, *supra*. Yet the prosecutor is prohibited from attempting to prove those offenses by questioning the congressman about the motives for his legislative acts. *Ibid*. The privilege rests on the constitutional judgment that the courts are not deemed the proper place to hold legislators accountable for their acts as elected representatives. *Tenney* v. *Brandhove*, *supra*, 341 U.S. at 378.

Implicitly, the concurring opinion argues that this principle of government is not applicable here because state legislators have no reason to expect interference in their affairs by a United States Attorney. This argument not only ignores the reality of the case, evidenced by the concession of the United States Attorney at oral argument that Illinois legislators would be inhibited in their official conduct were no privilege recognized; it also disregards the wisdom of the founding fathers, who feared that the federal government would impermissibly intrude upon the power of the states to govern their own affairs. See Federalist Nos. 23, 29, *supra*.

supra, 408 U.S. at 520, the Court more prudently noted that not only the "jurisdiction of Congress to punish its Members is not all-embracing," but also that the power of self-discipline has inherent limits. Here, however, the State of Illinois is under no such disabilities. While it is within the province of the United States Attorney to prosecute local officials who violate federal law, the primary responsibility for ferreting out their political corruption must rest, until Congress directs otherwise, with the State, the political unit most directly involved. Federalist No. 17, *supra* at 120. Admittedly, legislators may abuse their freedom of debate and discussion. But the common law history of the privilege in England and the United States teaches emphatically that it is better to tolerate the potential abuses than to risk the harm to our system of government that would result from inhibiting a legislator's discharge of the responsibility conferred upon him by the electorate. Our decision today does nothing more than recognize that important judgment.

II

Having determined that Markert enjoys a common law speech or debate privilege, we must now determine whether he waived its protection. The Speech or Debate clause is intended to provide a personal safeguard for the individual legislator and an institutional immunity for the legislature itself. *United States* v. *Brewster, supra,* 408 U.S. at 507; *United States* v. *Johnson, supra,* 383 U.S. at 179. This dual protection follows from the belief that the legislature's independence is predicated upon the independence of its members. *Tenney* v. *Brandhove, supra,* 341 U.S. at 377. As long as the individual legislator can

perform his function free from the threat of judicial and executive interference, the policy of the privilege is not offended. It therefore follows that to the extent the inquiry impugns only the personal independence of the legislator and does not call into question the independence of other members of the body, the protection of the speech or debate privilege can be waived.

In a criminal prosecution, a state legislator has a right under the due process clause to put into issue his own conduct as a representative if relevant. See *United States* v. *Nixon,* 418 U.S. 683, 711; *Washington* v. *Texas,* 388 U.S. 14, 19. Once introduced, the prosecution must be permitted to respond. Recognition of a privilege means that some relevant evidence will not be before the trier of fact. Because of the policies supporting the privilege, the court are willing to tolerate this "derogation of the search for truth." *United States* v. *Nixon, supra,* 418 U.S. at 709. However, it is a far more severe, and we believe impermissible, distortion of the process to admit evidence without affording the other party a chance to respond, or to hear testimony without permitting the opposition to cross-examine. This is fundamentally inconsistent with the view that "the two-fold aim [of criminal justice] is that guilt shall not escape or innocence suffer." *Berger* v. *United States,* 295 U.S. 78, 88. Once the legislator has chosen to make his conduct an issue, the court's interest that its processes not be subverted outweighs the claim of privilege. See *Branzburg* v. *Hayes, supra.*

This analysis is consistent with the Supreme Court's note in *Gravel* v. *United States, supra,* 408 U.S. at 622 n. 13, that a Senator can waive his aide's claim of privi-

lege.[6] If so, the Senator, and Markert in this case, should similarly be able to waive his own privilege. The courts have often held that evidentiary privileges may be waived by the involved individual. *E.g., United States* v. *Pauldino,* 487 F.2d 127 (10th Cir. 1973), certiorari, denied, 415 U.S. 981; *United States* v. *Moorman,* 358 F.2d 31 (7th Cir. 1966), certiorari denied, 385 U.S. 866; *Johnson* v. *United States,* 270 F.2d 488 (9th Cir. 1959), certiorari denied, 362 U.S. 924. The essence of a waiver is voluntary conduct. A decision to forego the protection of a privilege, to be valid, must be a free choice, and hence presents no challenge to the independence of the legislator.[7] Markert has not shown why his privilege should not

[6] The defendant contends that this footnote means that the Senator could simply acknowledge to the court that the aide was not acting as his agent. If so, the footnote is extraneous because the privilege would not apply. Therefore, it seems likely that the Court meant a Senator could require his aide to testify about actions which, if done by the Senator, would be within the scope of the privilege. Since the aide and the Senator are considered one for the purposes of the privilege (*Gravel* v. *United States, supra,* 408 U.S. at 616), the Senator must be able to waive the protection of the clause for himself as well as his aide.

[7] Because the Speech or Debate clause embodies institutional as well as personal protection, the scope of the waiver must be carefully limited. The difficulty is that the individual legislator's testimony and other evidence may involve not only his conduct but also that of the body as a whole. At that point the law is clear that "the Speech or Debate Clause clearly proscribes at least some of the evidence." *United States* v. *Johnson, supra,* 383 U.S. at 173. A clear threat to the institution's ability to function would be presented if members knew that one of their colleagues, by waiving his privilege, could raise doubts in the minds of grand jurors about the propriety of their conduct. Thus any waiver must be strictly limited to the conduct of the invididual representative.

be waivable as long as the waiver is limited to his own conduct.

In deciding whether Markert waived his privilege in this case, we need not find a knowing and intelligent forfeiture of the right. See *Johnson* v. *Zerbst,* 304 U.S. 458, 464; *United States* v. *Escander,* 465 F.2d 438, 441 (5th Cir. 1972); *United States* v. *Michael,* 426 F.2d 1067, 1069 (7th Cir. 1970). The lesser standard of voluntariness applies because the policy served by the privilege is not related to the fairness of the trial. *Schnekloth* v. *Bustamonte,* 412 U.S. 218, 242. Under the test of voluntariness, it need be shown only that the testimony is the "product of an essentially free and unconstrained choice by its maker." *Schnekloth* v. *Bustamonte, supra,* 412 U.S. at 225; *Columbe* v. *Connecticut,* 367 U.S. 568, 602. The question is the defendant's subjective state of mind, to be determined after an examination of all the facts and circumstances. *Schnekloth* v. *Bustamonte, supra,* 412 U.S. at 249; *Kelly* v. *Peyton,* 420 F.2d 912, 914 (4th Cir. 1970).

Markert contends that the facts of this case indicate that the decision to testify was not freely made. The heart of his argument is that he was not informed of his right to claim a speech or debate testimonial privilege either by the Government or by his own counsel. However, the Supreme Court has never held that the failure to inform the defendant of a privilege unrelated to trial fairness mandates a finding that the decision was not voluntary. *Schnekloth* v. *Bustamonte, supra,* 412 U.S. at 227; accord, *Byrd* v. *Lane,* 398 F.2d 750, 755 (7th Cir. 1968), certiorari denied, 398 U.S. 1020. When he appeared before the grand jury, he gave potentially damaging testimony rather than relying on his privilege against self-incrimination, of which he had been informed. Because he made a conscious choice

to testify, he waived the instant privilege. Although subpoenaed before the grand jury, Markert was not compelled to testify in violation of any of his rights. See *United States* v. *Calandra*, 414 U.S. 338, 346; *Kastigar* v. *United States*, 406 U.S. 441, 448. Because he was a state legislator, knowledgeable in the workings of the Government and represented by competent counsel, his election to testify waived his Speech or Debate clause privilege.

The order of suppression is reversed and the cause is remanded for further proceedings consistent herewith.

TONE, *Circuit Judge*, concurring. I concur in the result. I agree with the court that the speech or debate clause of the Illinois Constitution is inapplicable in this federal criminal proceeding, and that the question to be decided is whether the federal common law of evidence includes the privilege asserted. I disagree, however, with the court's view that, absent waiver, the defendant could claim a speech or debate privilege under the federal common law of evidence.

Several recent opinions of the Supreme Court have made it clear that the protection afforded state legislators from liability under federal law for acts done in their legislative roles, see *Tenney* v. *Brandhove*, 341 U.S. 367 (1951), is not based upon the speech or debate clause of the Federal Constitution, see *United States* v. *Brewster*, 408 U.S. 501, 516 n. 10 (1972), a clause that applies only to Congress, but rather upon the common-law doctrine of official immunity. See *Wood* v. *Strickland*, 420 U.S. 308, 316-318 (1975); *Scheuer* v. *Rhodes*, 416 U.S. 232, 243-244 (1974); *Doe* v. *McMillan*, 412 U.S. 306, 318-320 (1973). This is the same doctrine that was applied in *Pierson* v.

Ray, 386 U.S. 547, 554-555 (1967), to provide immunity to a judge for acts done in the course of his judicial duties.[1]

The speech or debate clause of the Federal Constitution protects members of Congress from being "questioned in any other Place" concerning the Supreme Court was held, "legislative acts or the motivation for actual performance of legislative acts." See *United States* v. *Brewster*, *supra*, 408 U.S. at 509. The clause provides both immunity from liability and a commensurate privilege against disclosure. *Gravel* v. *United States*, 408 U.S. 606, 616 (1972). The privilege against disclosure and the immunity from liability should also be commensurate when the basis for protection is common-law official immunity. Where there is no immunity, it would be incongruous, if not useless, to recognize an evidentiary privilege. Accordingly, I think that whether the claimed privilege should be recognized as a development in the federal common law of evidence depends on whether there is an underlying immunity.

The common-law immunity of state legislators has not been held to be coextensive with that which members of Congress enjoy under the federal speech or debate clause. Even with respect to civil liability, speech-or-debate immunity is broader than official immunity. The former bars injunction actions directed at legislative activities of Congress. *E.g.*, *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975); *Powell* v. *McCormick*, 395 U.S. 486 (1969). The doctrine of official immunity, on the other hand, has been held by one court not to bar injunctive relief against state legislative activities which offend federal law, *Jordan* v. *Hutcheson*, 323 F.2d 597 (4th Cir. 1963), and

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[1] *Tenney* v. *Brandhove and Pierson* v. *Ray* held that Congress had not intended by adopting the Civil Rights Acts to abrogate the official immunity of legislators and judges, supported as it was by strong tradition and sound reasons.

in other cases federal injunctions against state legislative action have been sustained without discussion of the question of immunity. *E.g., Bond* v. *Floyd,* 385 U.S. 116 (1966); *Bush* v. *Orleans Parish School Board,* 191 F.Supp. 871 (E.D. La.), *aff'd sub nom. Denny* v. *Bush,* 367 U.S. 908 (1961).

Unlike federal speech or debate immunity, see *United States* v. *Johnson,* 383 U.S. 169 (1966), common-law official immunity has not been extended to criminal liability. In *O'Shea* v. *Littleton,* 414 U.S. 488, 503 (1974), the Court said:

> "[W]e have never held that the performance of the duties of judicial, legislative, or executive officers, requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights. . . . On the contrary, the judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct as proscribed by an Act of Congress. . . .' [Citing *Gravel* v. *United States, supra,* 408 U.S. at 627.]"

Thus judicial officers are not immune from criminal liability for conduct within the scope of their judicial duties. *Braatelien* v. *United States,* 147 F.2d 888, 895 (8th Cir. 1945); see also *United States* v. *Manton,* 107 F.2d 834 (2d Cir. 1939). State legislators are similarly subject to federal criminal liability for analogous conduct which falls within the prohibition of a federal criminal statute, as the Court stated in *O'Shea.*

Immunity from civil but not criminal liability has been regarded as sufficient to achieve the purpose of the doctrine of official immunity, which is to promote independence and fearless discharge of duty on the part of the protected officials. While the federal speech or debate clause serves the same purpose, it has an additional, more fundamental purpose grounded in the separation of powers in the federal government. As the Court said in *Gravel* v. *United States, supra,* 408 U.S. at 616, 617:

> "The Speech or Debate Clause was designed to insure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch.
>
> . . .
>
> "[T]he central role of the Speech or Debate Clause [is] to prevent intimidation of legislators by the Executive and accountability before a possible hostile judiciary, *United States* v. *Johnson,* 383 U.S. 169, 181 (1966). . . ."

There being no problem of separation of powers between the federal executive (represented in this case by the United States Attorney) and a state legislature, the Constitution itself does not create an immunity for state legislators as it does for members of Congress. I see no need for the courts to do so either. Nothing in our history or in the authorities relied upon by the court in this case suggests that there is a threat of federal executive interference with the independence of state legislatures that would warrant extending the judicially developed doctrine of official immunity beyond its traditional boundaries. Accordingly, I would hold that the state legislator's official immunity does not extend to liability under federal criminal statutes, and that he therefore has no commensurate official[2] privilege against disclosure.

In questioning the view that the existence of the privilege should depend upon whether there is a corresponding immunity, the majority states in footnote 5 that "[a] member of Congress is not immune from prosecution on

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[2] He has of course the same privilege against self-incrimination that any other citizen has. He has not chosen to assert that privilege in this case.

charges of bribery or conflict of interest," and "[yet] the prosecutor is prohibited from attempting to prove those offenses by questioning the congressman about the motives for his legislative acts," citing *Brewster* and *Johnson*. This overlooks, I believe, an important distinction made in *Brewster*. As I understand that case, it did not hold that conduct which is not protected by an immunity from liability may nevertheless be privileged from inquiry. Brewster was charged with taking bribes in return for being influenced in respect of his official acts and with taking a bribe for an official act already performed by him. The Court held that the speech or debate clause permitted the government to prosecute those charges, because it could be done without inquiring into "the legislative acts of the defendant member of Congress or his motives for performing them." 408 U.S. at 526, quoting from *Johnson, supra*, 383 U.S. at 185. See also 408 U.S. at 527. The Court said:

> "There is no need for the Government to show that appellee fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise.
>
> "Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act." *Id.* at 526.

On the other hand, prosecution for legislative acts and inquiry into those acts or their motives, would have been prohibited by the speech or debate clause. Since bribe taking, however, was not protected by the speech or debate clause, the Court held that "inquiry into [such] activities" was not prohibited by the speech or debate clause. 408 U.S. at 528. In other words, for those acts for which there was no immunity, there was likewise no testimonial privilege. Thus *Brewster* shows that the immunity and the privilege are correlated.

The majority further states in the same footnote that the testimonial privilege for state legislators "rests on the constitutional judgment that the courts are not deemed the proper place to hold legislators accountable for their acts as elected representatives," citing *Tenney* v. *Brandhove*. I do not believe *Tenney* supports the view that state legislators have a speech or debate immunity derived from the Federal Constitution. See p. 14 above. If they do not, and if I am correct that the doctrine of official immunity leaves state legislators criminally liable under federal law for even their legislative acts, I cannot believe they are privileged (unless they choose to avail themselves of their fifth amendment right) to withhold testimony concerning acts for which they may be prosecuted.

In reaching the conclusion expressed in this concurring opinion, I have assumed that the Mail Fraud Act (18 U.S.C. § 1341) and the Hobbs Act (18 U.S.C. § 1951) extend to conduct of a state legislator in the performance of his official duties. It would be inappropriate, if not beyond our jurisdiction, to pass on the sufficiency of the indictment in this interlocutory appeal of an order suppressing evidence. *Cf. United States* v. *Merrits*, ... F.2d ....., No. 75-1198, Slip Op. p. 4 (7th Cir. 1975). Moreover, it is unnecessary to consider the scope of those statutes in order to decide this appeal: applying the approach of *Tenney* and *Pierson*, determining whether the doctrine of official immunity shields given legislative conduct is only a preliminary step in resolving the ultimate question of whether Congress intended a statute to apply to that conduct. It is accordingly unnecessary to reach that question in order to decide this case.

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Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 75-1592

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

ROBERT CRAIG, THOMAS J. HANAHAN and LOUIS A. MARKERT,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 74 CR 877
ALFRED Y. KIRKLAND, *Judge.*

Argued In Banc June 7, 1976—Decided July 9, 1976

Before FAIRCHILD, *Chief Judge,* SWYGERT, CUMMINGS, PELL, SPRECHER, TONE, BAUER and WOOD, *Circuit Judges.*

PER CURIAM. This interlocutory appeal by the government from an order granting defendant Markert's motion to suppress was originally heard by a panel comprised of Judges Cummings and Tone and Judge Robert L. Kunzig of the United States Court of Claims, sitting by designation. *United States* v. *Craig,* 528 F.2d 773 (7th Cir. 1976). The facts are set forth in the opinion of the panel majority.

The panel reversed the District Court's order but differed as to the grounds for reversal. All agreed that the existence of a privilege in this federal criminal proceeding was to be determined, not by the Illinois Constitution's Speech or Debate Clause, but by the federal law of evidence. The point of disagreement was whether the federal law of evidence included such a privilege. The majority, in an opinion by Judge Cummings, held that as a matter of federal common law, made applicable by Rule 501 of the Federal Rules of Evidence, Markert, a state legislator, enjoyed a common law speech or debate privilege which shielded him from inquiry into his acts as a legislator or the motives for those acts. The majority held that the suppression order should nevertheless be reversed because Markert, in testifying before the grand jury, had waived his privilege by answering questions concerning privileged matters rather than relying on his privilege. A concurring opinion by Judge Tone agreed with the result on the ground that there was no speech or debate privilege under the federal common law of evidence and did not reach the waiver issue. In summary, the concurring position was that the protection afforded state legislative roles is based on the common law doctrine of official immunity, the privilege is commensurate with the immunity, and since the immunity does not extend to criminal liability neither should the privilege.

After rehearing the case in banc, a majority of the court, Judges Pell, Sprecher, Tone, Bauer, and Wood, are persuaded that the views set forth in the panel concurring opinion are correct, and they vote to reverse on that ground. Judge Cummings adheres to the views set forth in the panel majority opinion, and concurs for the reasons there stated.

Since the reasons supporting the differing views of the in banc majority and concurring judge are fully set forth in the panel opinions, restating those reasons here would serve no purpose. The majority wishes to note, however, that the absence of a privilege has no relationship to the proof necessary to establish a crime involving official corruption; and that although a legislator's voting record and other legislative conduct is not privileged from inquiry it would not, standing alone, support an inference of wrongdoing or improper motive. Proof *aliunde* will be required.

Chief Judge Fairchild is of the view that the constitutional relationship between the states and the United States requires federal courts to recognize and honor the Speech or Debate Clause of the Illinois Constitution, but would hold that the privilege was waived for the reasons stated by the panel majority. Judge Swygert agrees with the panel majority as to the existence of the privilege and the reasons therefor but would affirm because he believes the privilege was not waived.

The order appealed from is reversed, and the case is remanded with directions to overrule the motion to suppress.

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

In the

United States Court of Appeals

For the Seventh Circuit

No. 77-1364

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT CRAIG and LOUIS A. MARKERT,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 74 CR 877—Alfred Y. Kirkland, *Judge.*

Argued November 4, 1977—Decided March 22, 1978

Before CUMMINGS and PELL, *Circuit Judges,* and CAMPBELL, *Senior District Judge.**

CAMPBELL, *Senior District Judge.* Among the members of the House of Representatives of the Seventy-seventh Illinois General Assembly were the defendants-appellants herein, Robert Craig and Louis A. Markert, both of whom were found guilty by a jury of conspiring to commit extortion under color of official right in violation of the Hobbs Act, 18 U.S.C. § 1951, and of mail fraud in violation of 18 U.S.C. § 1341. The events giving rise to the prosecution

* Senior United States District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

of these charges occurred during the Spring and Fall 1971 Session of the Illinois General Assembly, and concern the defendants' exacting $1,500 from a rental vehicle trade association known as the Illinois Car and Truck Renting and Leasing Association (CATRALA) by means of a "fetcher" bill.[1] We affirm.

The evidence showed that defendant Thomas J. Hanahan[2] introduced a bill entitled House Bill 2025 which was designed to amend the Illinois Vehicle Code. The amendment would require that the title certificate of a rental car carry an indication that the vehicle had been a rental vehicle. A title certificate so identified would result in reducing the resale price of a rental vehicle by five or six hundred dollars.

Shortly after introducing House Bill 2025, Hanahan and Craig met with Pete Pappas, an unindicted co-conspirator/co-schemer, who was chairman of the Motor Vehicle Committee of the House of Representatives. House Bill 2025 was to be assigned to Pappas' committee. It was agreed that the money generated by House Bill 2025 would be evenly divided, and that Pappas would not hold any committee hearings on the bill until Hanahan had time to negotiate with the CATRALA people.

On the last day of the Spring 1971 Session Doris Steigberg, the executive secretary and registered lobbyist of CATRALA, asked Craig about the status of House Bill 2025. Craig responded that he thought the bill could be stopped for $5,000. After Steigberg indicated that her people were having a difficult enough time paying her

[1] The record reflects that a "fetcher bill" is a bill introduced by legislators for purposes of exacting money from an industry.

[2] Hanahan was also named a defendant in the indictment. He was found not guilty on both counts.

salary, and that she didn't know how she could raise that amount of money, Craig instructed her to "take it back to [her] people and see what they can do." Steigberg immediately telephoned Frank LoNano, the President of CATRALA, at his Schiller Park, Illinois, office, and told him that she had been approached for money on House Bill 2025. A short time later Steigberg explained to a CATRALA board meeting the potential damage to the rental car industry posed by House Bill 2025, and further stated that she had been approached by a person in Springfield for money.

House Bill 2025 was scheduled for a committee hearing on October 22, 1971. A few days prior thereto Steigberg told Craig that her people indicated that the $5,000 figure was absolutely too much. In response to Steigberg's inquiry as to the least amount that would be acceptable, Craig urged her to "try for $2,000." Steigberg then spoke with LoNano. On the day of the hearing Markert asked Steigberg if she had heard anything. Steigberg told Markert that $2,000 was too much money, and asked if he could "try for fifteen hundred." Shortly thereafter Markert told Steigberg that although they were unhappy about it, $1,500 would be acceptable.[3] Steigberg informed LoNano of the agreed amount. The hearing on House Bill 2025 was postponed.

On November 12, 1971, Steigberg telephoned Lee Workman, the Assistant Vice President, Chicago Zone Manager for Hertz Corporation (Hertz), whose office was located in Des Plaines, Illinois. Hertz was a member of CATRALA, and Workman was a member of the CATRALA Board of Directors. Steigberg told Workman that time was running

[3] About two weeks later Markert made further inquiry about the money. Steigberg stated that $1,500 had been agreed upon and would be paid.

out regarding House Bill 2025, that the financial burden of $5,000 would fall on the four largest rental car operators, and that Hertz's share was $1,500.

Workman prepared a check drawn on Hertz's petty cash account at a Chicago bank. The check for $1,500 was made payable to Steigberg, and its stub carried the notation that it was drawn for a CATRALA assessment regarding Illinois title law. The check was sent by special delivery mail from the Hertz office in Des Plaines to Steigberg in Springfield.

Steigberg received the check on November 14, 1971. A cover letter from Workman accompanied the check. Steigberg destroyed the cover letter, and telephoned Workman insisting that he also destroy his copy of the letter.[4] After cashing the check at a hotel in Springfield, Steigberg placed the money in an envelope. On the outside of the envelope she wrote "Robert Craig, personal."

Steigberg took the envelope to Craig's office in the State Capitol, but found that Craig had departed for home. Craig's secretary, Sherron Ackley, indicated that she would be flying to Craig's home with some other materials and would take the envelope for Craig with her. Steigberg left the envelope with Ackley.

Some time later Pappas telephoned Craig and asked if they had received the money from the rental car bill. Craig answered affirmatively, and said he'd mail Pappas his share. Two or three days later, Pappas received $600 in cash in the mail.

House Bill 2025 was tabled during the following Spring Session of the General Assembly.

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[4] Workman had his copy of the cover letter destroyed. To the best of his recollection the letter stated that a check for $1,500 was enclosed for purposes of blocking the Illinois title law.

This prosecution has resulted in two previous decisions by this court. *United States* v. *Craig,* 528 F.2d 773 (1976) (*Craig I*), and the *en banc* decision on rehearing reported at 537 F.2d 957 (1976), *cert. denied sub nom. Markert* v. *United States,* 425 U.S. 973 (1976) (*Craig II*), dealt with an asserted testimonial privilege of a state legislator in the context of a federal criminal prosecution. In this appeal defendants contend that *Craig II* should be reexamined, and that the district court's refusal to dismiss the indictment on the ground that Congress did not intend the federal criminal statutes involved in this case to be applicable to state legislators should be reversed.

We recently rejected an identical contention in *United States* v. *Craig,* ..... F.2d ..... (7th Cir. 1977) (Slip opinion, No. 76-2089, December 12, 1977, pp. 54-56), a case involving the same appellant Craig as this case, but based on a different prosecution. We also reject the contention here. See also: *In Re Grand Jury Proceedings,* 563 F.2d 577, 582 (3rd Cir. 1977).

With respect to both counts of the indictment, defendants contend that there is insufficient proof. As to Count One, charging a violation of the Hobbs Act, (18 U.S.C. § 1951),[5] defendants' attack is three-pronged. First, noting

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[5] In relevant part, 18 U.S.C. § 1951 provides:

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section—

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

that they were charged with conspiracy to obtain money unlawfully from companies belonging to CATRALA, defendants argue that under general conspiracy principles there was no evidence upon which to rest jurisdiction to conduct a trial on the charges in the Northern District of Illinois.

Conspiracy is a substantive federal criminal offense. 18 U.S.C. § 371. Generally, proper venue for a prosecution of the substantive crime of conspiracy lies in the district where the agreement was entered into, *Hyde* v. *Shine,* 199 U.S. 62 (1905), or at the place where an overt act to effect the object of one of the conspirators was performed. *Hyde* v. *United States,* 225 U.S. 347 (1912). Pointing out that the evidence in this case showed neither an agreement among the defendants in the Northern District of Illinois, nor an overt act in furtherance of the conspiracy in that district, defendants argue that prosecution of a Hobbs Act conspiracy offense in the Northern District of Illinois was based on improper venue. We do not agree.

Federal district courts have exclusive jurisdiction of all offenses against the United States. 18 U.S.C. § 3231. Venue for the prosecution of federal offenses is established by Rule 18, F.R.Crim.P. in the district in which such offense is committed. Rule 18 thus reflects Article III, Section 2, Paragraph 3, of the Constitution, which mandates that criminal trials be "held in the State where the said crimes shall have been committed." The Sixth Amendment similarly guarantees a criminal defendant "the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

Venue for a Hobbs Act prosecution properly lies in any district where commerce is affected. *United States* v. *Floyd,*

228 F.2d 913, 918 (7th Cir.), *cert. denied,* 351 U.S. 938 (1956). See also: 18 U.S.C. § 3237. In this case the evidence showed that the federal offense of extortion occurred in the Northern District of Illinois because defendants' misdeeds affected commerce [6] in that district. The extorted money was shown to have come from the Hertz Corporation's petty cash fund in Chicago, in the Northern District of Illinois. Hertz Corporation was shown to be a company engaged in interstate commerce within the meaning of 18 U.S.C. § 1951(b)(3). Because the extortion affected commerce in Chicago, the District Court for the Northern District of Illinois was empowered to entertain that charge, regardless of the fact that defendants may have been prosecuted in another district under venue principles pertaining to conspiracy.

Defendants secondly argue that there was a failure of proof in that Hertz Corporation was shown to be the victim of the extortion, but that Hertz was not named as a victim in the indictment. We understand this contention to mean that there was a fatal variance between the Hobbs Act charge of the indictment and the proof of that charge adduced at trial. We find no such fatal variance.

The indictment charged the defendants with extorting $1,500 from "the registered lobbyist, officers, members of and companies belonging to the Illinois Car and Truck Renting and Leasing Association." The evidence adduced at trial demonstrated precisely what was charged: that

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[6] Extortion becomes a federal offense in violation of the Hobbs Act where it interferes with interstate commerce "in any way or degree." 18 U.S.C. § 1951(a). *Stirone* v. *United States,* 361 U.S. 212, 215 (1960).

defendants extorted $1,500 from the Hertz Corporation, which was shown to be a member of CATRALA. No claim is made that the proof took the defendants by surprise, or that the proof was so variant with the charge that defendants could not adequately prepare a defense or assert a finding on the charges as a bar to a subsequent prosecution. See *United States* v. *Warden,* 545 F.2d 32, 35 (7th Cir. 1976); *United States* v. *Cassell,* 452 F.2d 533, 536 (7th Cir. 1971).

As the third prong of their attack, defendants argue that the evidence failed to demonstrate that their extortionate conduct had an effect on interstate commerce, which is an essential element of a Hobbs Act prosecution. *Stirone* v. *United States,* 361 U.S. 212 (1960). There must be a nexus between the extortionate conduct and interstate commerce in order to establish federal jurisdiction. *United States* v. *Elders,* ..... F.2d ..... (7th Cir.). (Slip opinion, No. 77-1181, February 1, 1978, p. 5). The nexus may be a *de minimus* depletion of financial resources of a company engaged in interstate commerce. *United States* v. *DeMet,* 486 F.2d 816, 822 (7th Cir. 1973), *cert. denied,* 416 U.S. 969 (1974).

It was stipulated at trial that the Hertz Corporation was engaged in commerce as defined in the Hobbs Act. The evidence showed that the company's assets were depleted, albeit in a *de minimis* fashion, by the defendants' extortionate demands. We find sufficient evidence demonstrating an affect on interstate commerce which can be characterized as at least "arguably *de minimis.*" *United States* v. *Crowley,* 504 F.2d 992, 997 (7th Cir. 1974).

Count Two of the indictment charged the defendants with a violation of the mail fraud statute, 18 U.S.C. § 1341.[7] Defendants urge that their convictions on Count Two must be reversed because they did not cause the use of the mails, and there was no evidence adduced at trial to indicate that the use of the mails was foreseeable. Defendants point out that they were told that the extorted money would come from Steigberg's salary, and that there was no basis for foreseeing that Steigberg would deal in a fraudulent manner with Hertz in order to procure the $1,500.

The mail fraud statute forbids the use of or causing the use of the mails in connection with the execution of a scheme to defraud. The Supreme Court dealt with the question of causing the use of the mails in the following way:

> "Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be fore-

[7] 18 U.S.C. § 1341 provides:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

> seen, even though not actually intended, then he 'causes' the mails to be used. United States v. Kenofskey, 243 U.S. 440, 37 S.Ct. 438, 61 L.Ed. 836."

Pereira v. *United States*, 347 U.S. 1, 8-9 (1954). See also: *United States* v. *Craig, supra,* (Slip op. 12/12/77 pp. 38-45). The evidence in this case shows that defendants caused a reasonably foreseeable use of the mails.

The record shows that both Craig and Markert had conversations with Steigberg in which they refer to the CATRALA companies and personnel as "her [Steigberg's] people," thus reflecting defendants' understanding of Steigberg's role as an intermediary between defendants and CATRALA. During negotiations concerning the amount of extortion money, Craig instructed Steigberg to communicate the extortion demand to her people to "see what they can do." After the $1,500 figure was agreed upon, Markert inquired of Steigberg if "[s]he had heard and if the money was there."

In our view the record demonstrates that defendants were aware that the source of the extorted money was someone other than Steigberg. As such, it was certainly foreseeable that the money would have to be delivered by some means, and, further, it was foreseeable that the mails would be used to effectuate the delivery. Procuring the money from CATRALA was an essential part of the fraudulent scheme, and because the use of the mails for purposes of delivering the demanded money was reasonably foreseeable, defendants are accountable for that use of the mails under the mail fraud statute even though they did not personally use or intend to use the mail to further the scheme. *Pereira* v. *United States, supra, United States* v. *Craig, supra,* (Slip op. 12/12/77).

Doris Steigberg testified at trial under a grant of immunity. On direct examination the prosecutor inquired of her understanding of the terms of the arrangement:

> "Q. What is your understanding of the terms of that immunity?
>
> "A. That my testimony or evidence that I give will not be held against me as long as I tell the truth."

Defendants assert that it is common practice for a prosecutor to have an immunized witness emphasize that his testimony is being used so long as the witness convinces the prosecutor that he is truthful. Defendants further argue that questions and answers concerning the immunized witness' understanding of the terms of immunization convey to the jury the impression that the prosecutor is in a position to personally know whether or not a witness is truthful, and that consequently the jury is given the appearance of a witness whose veracity is vouched for by the government.

We find nothing improper about the question of the witness' understanding of the terms of the immunity order in this case. There was no insinuation by the prosecutor, direct or otherwise, that the government possessed knowledge to the exclusion of the jury on the issue of the immunized witness' veracity. Cf. *United States* v. *Creamer,* 555 F.2d 612 (7th Cir. 1977). Further, we believe that the jury's function of assessing credibility and weighing testimony is aided by evidence of an immunized witness' understanding of the terms under which he or she is testifying. Indeed, such questions by the prosecution frequently provide a convenient opening for more exploration of a fertile area on cross examination.

As part of its case, the government called defendant Craig's secretary, Sherron Ackley, as a witness. Defendants contend that the government called Ackley for the sole purpose of discrediting her before the defendants had an opportunity to call her as their witness. We find no merit to this contention.

Ackley corroborated Steigberg's testimony that she was Craig's secretary in November 1971 and that she did fly to Craig's home to deliver some materials. Ackley also

testified that she delivered to Craig the envelope that she had received from Steigberg.

However, contrary to Steigberg's testimony, Ackley testified that the envelope which she received from Steigberg was received in March, 1972. Ackley denied that she was ever uncertain as to when the receipt of the envelope took place. The government impeached Ackley's testimony with respect to her certainty as to March 1972 receipt of the letter by eliciting admissions from Ackley that she may have told a government agent that she was not certain when she received the envelope from Steigberg.

Although Ackley's testimony appeared to be of minor value to the government's case, it was nevertheless important because her testimony provided direct evidence that Craig had received the Steigberg envelope containing the extortion money. Under the circumstances of this case, Ackley's testimony as to her certainty of the date of the receipt of the envelope from Steigberg rendered Ackley properly impeachable under Rule 607 F.R.Evid.

Defendants finally contend that since there is no requirement in a "color of official right" Hobbs Act case to prove coercion,[8] testimony by the victims as to their state of mind at the relevant time should not have been allowed. We believe that the state of mind testimony of the victims was admissible to show that the victims' consent was induced by defendant's office.

For the foregoing reasons, the defendants' convictions are affirmed.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[8] *E.g., United States* v. *Staszcuk*, 502 F.2d 875, 882-3 (7th Cir.), *cert. denied*, 423 U.S. 837 (1975).

APPENDIX D

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 76-2089, 76-2090, 76-2092 and 76-2093 Consolidated

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT CRAIG, FRANK P. NORTH, JR., PETER V. PAPPAS and JACK E. WALKER,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 74-CR-879—**George N. Leighton**, *Judge.*

ARGUED JUNE 16, 1977—DECIDED DECEMBER 12, 1977

Before SWYGERT, CUMMINGS, *Circuit Judges*, and CAMPBELL, *Senior District Judge.**

CAMPBELL, *Senior District Judge.* In December, 1974, fifteen persons were charged in various counts of a fourteen count indictment. Count One charged the defendants with conspiracy to commit mail fraud in violation of 18 U.S.C. § 371. Counts Two through Twelve charged the substantive crime of mail fraud in violation of 18 U.S.C. § 1341, alleging that the defendants and unindicted co-conspirators devised a scheme and artifice to "defraud the citizens of the State of Illinois of their right to the loyal, faithful, and honest services of those defendants and co-conspirators ... who were public

* Senior District Judge William J. Campbell of the United States District Court for the Northern District of Illinois is sitting by designation.

officers and members of the Illinois General Assembly . . . in the performance of acts related to their official duties and functions." Counts Two through Twelve also alleged that the defendants devised a scheme to "defraud the State of Illinois, its citizens, its public officers, its public employees and the loyal, faithful and honest members of the Illinois General Assembly of their right to have the State's legislative business conducted honestly and impartially, and in accordance with the laws of Illinois, free from deceit, corruption, misconduct, conflict of interest, bribery and fraud, and willful concealment thereof." Each of Counts Two through Twelve alleged that the various defendants and co-schemers caused a specific mailing to be made for the purposes of executing the scheme. Each of Counts Two through Twelve are also alleged to be overt acts of the conspiracy charged in Count One. Counts Thirteen and Fourteen charged a violation of 18 U.S.C. § 1951, alleging that the various defendants caused an individual to travel in interstate commerce with intent to promote an unlawful activity, namely bribery in violation of *Illinois Revised Statutes*, Chapter 38, § 33-1.

Prior to trial seven defendants entered pleas of guilty to Count One, and the other charges against them were dismissed. Eight defendants stood trial. Following a jury trial that lasted over two months, six defendants were found guilty, and two were acquitted. The proceedings and disposition as to each defendant are set forth in the margin.[1]

[1]

DEFENDANTS	PROCEEDING	VERDICT	SENTENCE
A. *Elected Officials*			
Robert Craig	Trial	Guilty, as charged	3 years, $5000.
Frank P. North	Trial	Guilty, Ct. 1, 10-12	3 years, $5000.
Donald D. Carpentier	Plea		3 years, $5000.
Kenneth Course	Trial	Guilty, as charged	3 years, $5000.
Louis Capuzi	Trial	Guilty, as charged	Acquitted/Post Trial
John Wall	Trial	Not Guilty	
Jack Walker	Trial	Guilty, as charged	3 years, $5000.
B. *Employee/Ill. Secy. of State.*			
Peter V. Pappas	Trial	Guilty, as charged	5 years, $10,000.
C. *Ready-Mix Industry Representatives*			
Bernard Arquilla	Plea		2 year Probation, fine
Jack Chalden	Plea		2 year Probation, fine
Herbert Craig	Plea		2 year Probation, fine
Arnold Moeller	Plea		Deceased
Merlin Wille	Plea		1 year Probation
John Edmier	Plea		1 year Probation
Francis Sheahan	Trial	Not Guilty	

I. FACTS[2]

In the six county metropolitan Chicago area, a trade association known as the Northern Illinois Ready-Mix and Materials Association (NIRMMA) represented the interest of the ready-mix cement industry. For many years prior to the events which formed the basis of this prosecution, NIRMMA, through its Transportation Committee, was desirous of increasing by one cubic yard[3] per truck the amount of ready-mix cement which industry trucks could legitimately haul on Illinois roads.

The Board of Directors of NIRMMA held a meeting in Chicago on October 20, 1971. At this meeting, James McBride,[4] an employee of Material Service Corporation and an unindicted co-conspirator, informed the NIRMMA Board that the Illinois garbage hauling industry had just obtained weight relief for garbage trucks through the passage of legislation in the Illinois General Assembly, and that the time was right for the ready-mix cement industry to do likewise. McBride indicated that he knew an attorney, defendant Peter V. Pappas, who could assist the ready-mix industry in drafting their legislation for a $5,000.00 fee. McBride also stated at the meeting that Peter V. Pappas was very close to the Illinois Motor Vehicle Laws Commission—an important Commission in obtaining the passage of weight relief legislation—and that any such legislation would cost a considerable amount of money. Two

[2] Based on our reading of the voluminous transcript of proceedings below, we find the government's statement of facts to be fair and accurate. Hence, our discussion of the facts is based primarily on the statement contained in the government's brief. In those instances in which the defendants have claimed that the government's statement of facts is at variance with the evidence adduced at trial, we have formulated our own statement where necessary.

[3] The record indicates that one cubic yard of ready-mix material weighs about 4,000 lbs.

[4] McBride was deceased at the time of trial.

NIRMMA Board members, Arnold Moeller of Meyer Material Company and Bernard Arquilla of Accurate Ready-Mix, estimated that the weight relief legislation could run as high as $100,000.00.

About one week after this meeting, McBride met with members of NIRMMA's Transportation Committee at the NIRMMA offices in Chicago. McBride informed the members that the assistance of Peter V. Pappas was necessary in procuring the desired weight relief legislation, and that an undisclosed amount of money would be required. Morris A. Lauwereins, an unindicted co-conspirator and co-chairman of the NIRMMA Transportation Committee, participated with other committee members in drawing up an agenda specifying what relief the industry desired, and instructed McBride to meet with Peter V. Pappas. In order to assure a statewide effort for ready-mix truck weight relief, Lauwereins told other committee members to contact the downstate ready-mix association, known as the Illinois Division—Midwest Ready-Mix Concrete Association.

McBride, Merlin Wille, Lauwereins, and Tom Connolly, the Executive Secretary of NIRMMA—all of whom were associated with the ready-mix industry—met with Peter V. Pappas several days later in a private room at a Chicago hotel. Peter V. Pappas outlined the procedures to be followed in seeking weight relief legislation. After Lauwereins gave him the agenda specifying the relief sought by the industry, Peter V. Pappas stated that an unspecified amount of money would be required at a later time, and that his fee for drafting the proposed bill was $5,000.00.

The record demonstrates that sometime during the period from mid-October, 1971, to the early part of November, 1971, Peter V. Pappas spoke with Representative Pete Pappas,[5] a Republican member of the Illinois House of Representatives and a member of the Illinois Motor Vehicle Laws Commission. Peter V.

[5] Pete Pappas and Peter V. Pappas are not related. They will be referred to by these names throughout this opinion.

Pappas informed Pete Pappas of his meeting with the ready-mix industry people and stated "he thought he could get us some money for the passage of weight relief legislation." In answer to Peter V. Pappas' question as to how much it would take, Pete Pappas answered that he did not know, but would check and get back to Peter V. Pappas.

Pete Pappas testified that he then spoke with defendant Donald Carpentier, a Republican member of the Illinois Senate, and also a member of the Motor Vehicle Laws Commission. Pete Pappas testified that he told Carpentier that Peter V. Pappas had said "that there was a chance that we could get some money on weight relief from the ready-mix people," and had inquired of him as to how much it would take.

Pete Pappas further testified that later that same day he talked with defendant Robert Craig, a Democratic member of the Illinois House of Representatives. Pete Pappas told Craig that Peter V. Pappas had said "that there was a chance that we could get some money on the weight relief for the ready-mix industry." After reiterating to Craig that Peter V. Pappas had asked him how much it would take and that he answered him that he did not know, and that he had asked the same question of Carpentier and had received the same answer, Pete Pappas testified that he asked Craig: "Bob, if you have any idea as to how much money it would take to get it through?" Craig answered that he wasn't sure but would get back to him.

Pete Pappas further testified that Craig contacted him within a few days. A conversation ensued among Craig, Pete Pappas and Carpentier. Pete Pappas asked Craig if he had any figures or any idea how much it would take. Craig responded that he thought he could get it through for "ten". Following Craig's lead, Pete Pappas and Carpentier each indicated that it would take "ten" to get the legislation through his side.[6] During this conversa-

[6] The testimony of Representative Pete Pappas reflects that the House chamber and the Senate chamber are each divided by aisles which run through the center of each respective chamber. The aisles divided each chamber into sides which were occupied along party lines. Thus, the Democratic side of the House, Republican side of the Senate, etc.

tion, Craig indicated that the money would have to be paid as the bill passed each House. Carpentier was to handle the Republican side of the Senate; Craig, the Democratic side of the House; and Pete Pappas, the Republican side of the House. The three then discussed the need for a Democratic Senator to handle the bill on that side, and Pete Pappas indicated that he would talk with Senator Kenneth Course.

A few hours later, Pete Pappas spoke with Senator Course at Course's desk on the floor of the Illinois Senate. Pappas said, "Kenny, there is going to be some money on the cement bill and I just finished talking with Bob [Craig] and Don [Carpentier] and we are going to try and get ten for each side to get the bill through and I want to know if you would be willing to handle the Democratic side of the Senate." Course responded: "It is whatever you guys decide is fine with me." Pete Pappas advised Course that the money would be paid as the bill passed each House.

While these events took place in Springfield, Wille and Lauwereins met with representatives of the downstate ready-mix trade association, the Illinois Division—Midwest Ready-Mix Concrete Association (ID-MRCA), on October 30, 1971, at a restaurant in Bloomington, Illinois. Defendants Jack Chalden and Herbert Craig,[7] both associated with ID-MRCA, and Lou Marcy and Ed Sembel of other downstate concerns were told by Lauwereins that the time was right for ready-mix truck weight relief and that ID-MRCA and NIRMMA should join together in the effort because it would be expensive. Lauwereins also told the group that it would be wise for a downstate spokesman to promote and carry through the bill. He indicated to the downstaters that there would be a $5,000.00 fee for drafting the bill, as well as other unidentified expenses.

On November 5, 1971, a luncheon meeting was held at a Chicago hotel. Present at this meeting were downstaters Chalden and Sembel and NIRMMA members

[7] Defendant Herbert Craig is not related to defendant Robert Craig.

Wille, Lauwereins, McBride, Connolly, one Wes Wiggington and one Bill Hendrickson. Lauwereins chaired the meeting, and introduced Peter V. Pappas to those present as the gentleman who could assist them in securing the legislation. Peter V. Pappas then informed the group that weight relief should be sought for ready-mix trucks only.[8] Peter V. Pappas also presented Tom Connolly of NIRMMA with two $2500.00 invoices for his drafting fee, and indicated that an undisclosed amount of money would be required at a later date, and that they "should be prepared to participate with campaign contributions and other legislative support." Some discussion ensued as to who would function as a conduit for the funds, but nothing was decided. According to Wille's testimony, Peter V. Pappas explained at the meeting that the bill he would draft "would appear to be very much a watered down bill" on the first and second readings, and on the third reading, amendments would be introduced "that would really introduce the gist of what we wanted." Peter V. Pappas further explained, according to Wille, that the undisclosed amount of money would be required only if the bill passed both Houses, was signed by the Governor, and was indexed.[9]

Chalden's testimony as to the November 5, 1971 luncheon meeting revealed that Peter V. Pappas suggested to those present that an effective way of introducing the bill was through the Illinois Motor Vehicle Laws Commission (MVLC or Commission). He further stated that it would be possible, if the bill were properly presented, to have the bill come out as a Commission sponsored bill. Since a Commission meeting was close at hand, Peter V. Pappas advised those present that they would have to develop something quickly and that he would help them develop testimony.

[8] Initially, the industry sought weight relief legislation pertaining to dump trucks as well as ready-mix cement trucks.

[9] Indexing, in this context, means the assignment of a law to a specific area of reference in a scheme of statutory compilation. For a bill to become law, indexing is not a necessary requirement. See: Ill. Const. Art. IV, §§ 8 and 9.

Peter V. Pappas reiterated the sentiments Lauwereins expressed earlier in Bloomington that it would be best to have a downstate spokesman introduce the bill in the Commission.

Meanwhile, back in Springfield, a few days after Pete Pappas, Craig and Carpentier discussed the amount of money required to get the bill through, Pete Pappas spoke with Peter V. Pappas in the Capitol Building. Pete Pappas informed Peter V. Pappas that he had talked with Craig, Carpentier and Course and that "they would need $20,000.00 for the House and $20,000.00 for the Senate" and that Peter V. Pappas was to put "whatever he needed for himself on top of that and that the money would have to be paid as the legislation passed each House." Peter V. Pappas then said, "O.K., I will get back to you."

The Commission held a meeting at a hotel in Springfield on the evening of November 8, 1971. Herbert Craig of the downstate industry association (IDMRCA) was to make a presentation of the industry's proposal on ready-mix weight relief. On the afternoon preceding the meeting, Peter V. Pappas met with Wille, Lauwereins, Chalden, McBride, Marcy and Herbert Craig to prepare and rehearse Herbert Craig's presentation. Following Herbert's presentation to the Commission, the Commission directed Herbert to return to the Commission's December meeting with a drafted bill or drafted presentation.[10]

About ten days after the MVLC meeting, the recording secretary of MVLC, Mary Ellen Kingery, mailed

[10] At this point, the government's statement of facts contains a paragraph, substantially reiterating the testimony of Pete Pappas. In effect Pete Pappas testified that just prior to the November 8, 1971 MVLC meeting, he had a conversation with defendant North relating to the availability of money on weight relief legislation for the ready-mix industry. At that conversation, Pete Pappas told North, "I had something going on the cement bill and it was going to be in the Commission meeting." North responded, "Fine." Although of no relevance to the events immediately preceding and following in the statement of facts, this evidence of North's initial exposure to the scheme is treated *infra*.

copies of a notice of the date, time, and place of the December, 1971, meeting to persons on a mailing list she maintained. Tom Connolly, the executive secretary of NIRMMA, who had earlier requested that NIRMMA be placed on the MVLC mailing list, received a copy of the notice of the December, 1971 MVLC meeting in the mail.

On December 8, 1971, Peter V. Pappas presented a request to the Legislative Reference Bureau, a bill drafting agency for Illinois government, for the drafting of the bill that ultimately became House Bill 4176, the "cement bill."

At the December MVLC meeting, a subcommittee was created to consider the ready-mix legislation. Course, Carpentier, and Pete Pappas were included as members of the subcommittee. Following this meeting, Miss Kingery mailed out notices to those on the mailing list informing them of the date, time, and place of the January 1972 MVLC meeting. The notice also announced that the subcommittee would report on the ready-mix matter.

The MVLC meeting took place on January 10, 1972, in Springfield. On the afternoon of that day, Peter V. Pappas presented to an executive session of the MVLC the proposals of the ready-mix industry, among which was the proposal that ultimately became House Bill 4176. On that same day, Wille met McBride in a bar at a Springfield hotel. After exchanging pleasantries, McBride told Wille "Well, Mert, I have gotten the word. I know what they want now, fifty big ones." McBride informed Wille that Peter V. Pappas had given him this figure earlier, that the money would have to be in cash, and that if the bill did not become law, no money would be required. McBride and Wille then went to Lauwereins' room in the same hotel and informed him of the $50,000.00 figure.

Later in the evening of the same day, Wille, McBride, Lauwereins, and Peter V. Pappas met in the same bar in the Springfield hotel. Peter V. Pappas stated that he thought that the garbage legislation had cost as much as the ready-mix legislation, and that they should consider

a conduit for the funds. No decision was reached, however, as to who would act as the conduit.

During the period of February 13 to 17, 1972, NIRMMA held its annual convention in Miami Beach, Florida. At this convention a group of several NIRMMA members[11] engaged in a poolside conversation as to the ready-mix bill. After Wille and Connolly informed the group that $50,000.00 in cash was required to secure the bill's passage, a discussion ensued as to how the money could be raised. Several suggestions were made, but the record does not show that any decision on this issue resulted from the discussion.

A couple of weeks after the NIRMMA convention, McBride had a telephone conversation with Tom Connolly. McBride told Connolly that the $50,000.00 fund would have to be available by April 1, "as the people wanted to know that the money was available as the legislation was going through." McBride said that the cash would be placed in a safe deposit box. Signators on the box were to be Connolly and another NIRMMA member, Peter V. Pappas and his wife.

In mid-February, 1972, after the Florida convention, the NIRMMA Transportation Committee held a meeting. Lauwereins, who chaired the meeting, explained the cement bill and its benefits to the ready-mix industry. Lauwereins stated that the bill would cost $50,000.00 in cash, and that it had been decided that the sum would be raised by assessing NIRMMA members $40.00 for each ready-mix truck they owned. NIRMMA Transportation Committee members were then assigned specific collection duties.

About this time, on February 29, 1972, Lauwereins travelled from Chicago to Indianapolis, Indiana and addressed a group of downstate Illinois ready-mix executives including Chalden and Herbert Craig. This address took place in a hotel room in Indianapolis. The downstate ready-mix industry association (ID-MRCA) was holding its annual convention in Indianapolis.

[11] Merlin Wille, Tom Connolly, Bernard Arquilla, Rich Wille, Jerry Nagel, and Lou Lincoln.

Lauwereins told the group that the favorable ready-mix bill would cost $50,000.00 in cash, which had to be collected quickly and placed in a safe deposit box. After indicating to the group that the money would not be paid out unless the bill became law, Lauwereins encouraged ID-MRCA to support the effort by collecting half of the $50,000.00 amount. Lauwereins then returned to Chicago. In spite of Lauwereins encouragement and request for support, ID-MRCA refused to participate in the cash collection effort.

During the month of March, 1972, NIRMMA transportation committee members pursued the collection duties previously assigned by Lauwereins.[12] By the end of the month, Connolly told Wille to meet him at the NIRMMA office with the collected cash. Wille told Connolly that the fund was $3160.00 short because some companies had refused to contribute. Wille agreed to make up the $3160.00 shortage in the form of an advance from Moeller through Meyer Material.

On the morning of March 30, 1972, Wille, Lauwereins, McBride and Connolly met at the NIRMMA office. A total of $50,000.00 in cash was counted by Connolly and placed in an envelope. Wille informed Connolly that Moeller of Meyer Material had contributed the $3160.00 to make up for the shortage and suggested that false expense vouchers should be prepared and presented to Connolly to reimburse Meyer Material for the extra money. Connolly agreed, and false vouchers were prepared and submitted to NIRMMA by Wille, Moeller,

[12] The record reflects the following collections: Arquilla collected funds from Accurate Ready-Mix, Brandt Ready-Mix, Oremous Company, and Valenti Ready-Mix, and gave the collected funds to Connolly; Edmier collected cash from Edmier, Inc., Jousma Ready-Mix, Davidson Ready-Mix, and Van's Fuel and Material, and gave the cash to Wille; Wigginton collected from Evanston Fuel and Material, Dealer's Ready-Mix, Edison Fuel and Material, and Thelen Ready-Mix and had the cash delivered to Wille; Lauwereins collected cash from Lester Crown of Material Service Corporation; Wille collected cash from Meyer Material, Cowhey Company, Kuhn Ready-Mix, and also received cash from Moeller which was collected from several other ready-mix companies.

Lauwereins, and Arquilla. Lauwereins and Arquilla mailed their expense vouchers to the NIRMMA office. Connolly then prepared NIRMMA checks which, when cashed, were used to reimburse Meyer Material for its $3160.00 advance.

Having assembled the fund, Connolly and McBride left the NIRMMA offices and drove to the First National Bank of Lake Bluff where they met Peter V. Pappas in the parking lot. Peter V. Pappas asked Connolly if he had the money, to which Connolly answered affirmatively. Thereupon, Connolly, with the money in his hand, and Peter V. Pappas entered the bank. McBride remained in the car. After entering the bank, Peter V. Pappas mentioned to Connolly that he had arranged for a safe deposit box. Connolly signed a signature card, and took a second signature card for Arquilla's signature. Connolly received a key to the safe deposit box, and then he and Peter V. Pappas took the box which the clerk had handed to them into a small room where both counted the money and placed it in the box. They returned the box to the clerk, who placed it in the vault. Both departed from the bank.

House Bill 4176, the "Cement Bill," was introduced in the Illinois House of Representatives on April 11, 1972. Two or three days prior to that date, Peter V. Pappas told Pete Pappas in the rotunda area of the Capitol Building that the cash had been collected and was in a safe deposit box in the Chicago area. Peter V. Pappas assured Pete Pappas that, although the money was located in Chicago, there would be no problem in delivering the money. Peter V. Pappas also told Carpentier that the money had been put in a safe deposit box.

House Bill 4176 was assigned to the House Motor Vehicle Committee. A notice was posted on April 20, 1972 for hearings by that committee. Prior to the posting, Peter V. Pappas told Pete Pappas that the cash was in a safe deposit box and everything was set to go. Peter V. Pappas also said that the industry would pay the money as soon as the Governor signed the bill. Pete Pappas then stated, "Wait a minute, Pete. That wasn't

our deal. Our deal was that the money was to be paid as it passed each House." Peter V. Pappas replied, "Well, this is what the industry wants." Pete Pappas then responded, "Well, I'm going to have to talk to Bob on that."

Immediately thereafter Pete Pappas spoke with Robert Craig and told Craig that Peter V. Pappas had said that the industry was not going to pay any money until the bill had been signed by the Governor. Craig responded "That wasn't our deal. Our deal was it was supposed to be paid as it passed each House." Pete Pappas replied, "Well, then we better go over and talk to Pete [Peter V. Pappas], about it."

Within a few minutes, Craig and Pete Pappas spoke with Peter V. Pappas. Craig said "Peter, our deal was that we were to get paid when the bill passed each House." Peter V. Pappas replied, "The industry is not going to pay until this bill is signed by the Governor." After further discussion, Robert Craig asked Pete Pappas if it were all right if they compromised and said, "We would let it go until it passed both Houses and then get the money." Craig then told Peter V. Pappas that, "We would compromise and the industry would have to pay us the money after it passed both the House and the Senate but it had nothing to do with the Governor's signature." Peter V. Pappas responded, "Okay, I will talk to them." A few days later, Peter V. Pappas informed Pete Pappas that "the industry would pay, would go ahead with our agreement and pay when the bill passed both houses of the General Assembly."

House Bill 4176 was passed by the Illinois House of Representatives on May 12, 1972. The bill was introduced in the Illinois Senate on May 15, 1972.

About a week or two weeks before House Bill 4176 was introduced in the Illinois Senate, Carpentier spoke with ten Republican senators, among whom was Jack E. Walker, a Republican member of the Illinois Senate from Lansing, Illinois. In the conversation with Walker, Carpentier asked Walker to support the cement bill and Walker said he would. Carpentier also told Walker "that there would be help in his district."

After speaking with Walker and the nine other Republican senators, Carpentier told Peter V. Pappas that Carpentier "could muster 11 votes on the Republican side." Peter V. Pappas replied that he would see what he could do on the other side of the aisle. One or two days after that, Carpentier told Course that Carpentier had 11 votes and that Course "would have to muster up the rest."

While House Bill 4176 was pending in the Senate committee (around June 1, 1972), Herbert Craig received a phone call from Lauwereins who told Herbert Craig that the bill was in jeopardy and that Peter V. Pappas needed $500 in cash. Lauwereins told Herbert Craig to draw the $500 from his out-of-pocket expenses and Lauwereins would render a statement from NIRMMA covering the $500. Lauwereins told Herbert Craig to take the $500 to the third floor of the Capitol Building where Peter V. Pappas would meet him. Herbert Craig related Lauwereins' request to Chalden.

The next day, June 2, 1972, Herbert Craig and Chalden prepared a $500 check and cashed it. Herbert Craig took the cash to the third floor of the rotunda area and was met by Peter V. Pappas. Peter V. Pappas asked Herbert Craig if he had the envelope with the money and when Herbert Craig replied, "Yes," Peter V. Pappas said "Follow me." They went into an office and Peter V. Pappas opened a magazine, laid it on a desk and told Herbert Craig to put the envelope with the money inside the magazine. Craig did as instructed and Peter V. Pappas said "That's all. You may be excused." Herbert Craig then left and related the incident to Chalden.

The Senate sponsor of House Bill 4176 was originally Senator Harris. About mid-June 1972, while House Bill 4176 was pending in the Senate, Carpentier told Walker that Senator Harris could no longer sponsor the bill because Harris was sick. Carpentier told Walker that if Walker would handle the bill, "that an additional $500 would be given him." Walker agreed to handle the bill.

Thirty senators voted in favor of House Bill 4176 in the Illinois Senate, which was the exact number of votes required for passage. House Bill 4176 was passed by the Illinois Senate on June 21, 1972.

Chalden, the executive secretary of the ID-MRCA was sitting in the Senate gallery when House Bill 4176 passed the Senate. The following day, June 22, 1972, Chalden prepared a bulletin announcing the fact that House Bill 4176 had passed the Senate and was heading to the governor. Chalden mailed a copy of that bulletin to every member of the ID-MRCA, including Material Service Corporation, to inform them of the bill's passage and to urge them to contact the governor and urge the governor to sign the bill into law.

Connolly mailed a similar bulletin to every regular member of NIRMMA on June 23, 1972 to urge the members of NIRMMA to write, wire or call the governor and ask the governor for favorable approval of the bill. Wille, upon receipt of a copy of the bulletin, sent a telegram to the governor, and received a response from the governor's office. Carpentier also urged the governor to sign the bill.

The spring session of the Illinois General Assembly ended on July 1, 1972. After the end of the legislative session, Pete Pappas telephoned Peter V. Pappas in early July 1972 and said, "Peter, this is Pete. I am just calling to see when we are going to get our money." Peter V. Pappas replied that he was trying to get it together and they were a little slow, but he would see what he could do." Peter V. Pappas recommended that Pete Pappas call McBride and gave McBride's phone number to Pete Pappas.

In the early to middle part of July 1972, Pete Pappas telephoned McBride and told McBride, "Jim, this is Representative Pete Pappas and I am calling about the money." McBride said, "Well, they are working on it." Pete Pappas replied "Well, we have some commitments to meet." McBride responsed, "Well, let me check into it and I will get back to you."

In early August 1972, Peter V. Pappas informed Pete Pappas that the industry was not going to pay because there was a rumor that the governor was going to veto the bill. Pete Pappas responsed, "I don't care about that, we have commitments to meet and we at least want to pay our commitments." Peter V. Pappas replied "Well,

why don't you call Morry Lauwereins and talk to him about it," and gave Pete Pappas Lauwereins' phone number.

That same day or the next day, Pete Pappas telephoned Lauwereins and said, "Mr. Lauwereins, this is Representative Pete Pappas and I am calling about the money." Lauwereins said "I understand that the Governor is going to veto the bill." Pete Pappas responded, "Well, I don't care what the Governor does because that wasn't part of our arrangement. Our arrangement was to get it through both Houses and you agreed to pay. Now we have commitments to meet and we would like to have the money." Lauwereins said he would check into it and let Pete Pappas know.

On August 8, 1972, House Bill 4176, the cement bill, was vetoed by Governor Ogilvie. On that day the $50,000 was still in the safe deposit box.

On August 14, 1972, during a tugboat ride in conjunction with an MVLC meeting, Course told Carpentier that some of Course's fellows were "getting restless," and Carpentier replied, "I will talk it over with Representative Pappas, because he is handling it."

Also, in August 1972 after the veto, McBride told Wille that Senator Course had called McBride and had asked McBride for his campaign contribution. McBride told Wille that McBride had told Course that McBride did not know anything about it. Lauwereins also called Wille about the same time. Lauwereins said that he had received some information that "some of the legislators felt they had done their job and that even though the bill had been vetoed and it had not become law, that they should be entitled to some money." Wille asked Lauwereins, "What about our earlier 'no bill, no pay' provision?" Lauwereins replied that that was the earlier agreement.

At a luncheon meeting among Wille, McBride, and Lauwereins at a restaurant in Hillside, Illinois, in the latter part of August 1972, McBride told Lauwereins of the phone conversation McBride had had with Course. McBride went on to say that he had had a recent conversation with Peter V. Pappas and that the

legislators felt that they had done their job and although the earlier agreement was $50,000 they were willing to settle for $30,000. McBride stated that before it was decided not to pay anything the industry should consider the consequences of a veto override or an additional seasonal or permit bill. McBride also said that Peter V. Pappas had said he could draw up an additional bill, a seasonal or permit bill, for an additional fee of $5,000. Wille stated that they could not spend any of the money that had been collected because of their representations to the other ready-mix dealers that it was "no bill, no pay." Lauwereins concurred.

Wille, the following morning, informed Moeller of McBride's comments. Moeller agreed that the $30,000 should not be taken from the $50,000 fund, but that the $30,000 should come from the two companies that had the most trucks in the industry, Meyer Material Company and Material Service Corporation.

At a motel in Des Plaines, Illinois, McBride, Lauwereins, Moeller, Wille and Gerald Nagel of Material Service Corporation met in early September 1972. Lauwereins told Nagle and Moeller that the legislators felt they were entitled to $30,000 instead of the original $50,000 and that Peter V. Pappas could draw up a seasonal or permit bill for an additional $5,000. Nagel and Moeller both asked what happened to the original no bill, no-pay agreement. McBride could not answer that question, but said that Nagel and Moeller should consider what the consequences might be if they chose not to do anything. McBride also said that it was possible that there could be a veto override and that Moeller and Nagel should consider what should be done. Lauwereins and Wille said that they, themselves, could not make the decision. Moeller said "the $30,000 should be put up and it should be contributed by Meyer Material and Material Service Corporation." Nagel concurred.

On the evening of September 11, 1972, following the MVLC meeting Peter V. Pappas told Craig, Carpentier and Pete Pappas that the industry was not going to pay anything for the passage of the bill because the Governor had vetoed it. Pete Pappas then said, "That

was not our deal. We had a commitment; they were going to pay us if it passed both Houses. We had no control over what the Governor did." Pete Pappas went on to say, "We have commitments that we have to meet; they should at least pay us enough so we could meet our commitments." There was a general discussion about the amount of money necessary to fulfill commitments. Craig said that he thought that he could take care of his commitments for "five." Pete Pappas and Carpentier agreed that if Craig could take care of his commitments for $5,000, they could take care of their commitments for the same amount. Peter V. Pappas said that he would talk to the industry and get back to them.

In September 1972, Lauwereins telephoned Wille and asked Wille to take Meyer Material Company's half of the $30,000 to McBride's house in Westchester. Wille told Moeller about Lauwereins' phone call requesting Wille to take the money to McBride's house, and asked Moeller to have the money ready when Wille needed it. Moeller said he would.

Around the end of September, Wille received $15,000 in $100 bill denominations in an envelope from Moeller. That same day Wille went to McBride's house in Westchester. Lauwereins and Wille arrived at McBride's house at about the same time. They proceeded to the basement of the house where they met McBride and Peter V. Pappas. Wille and Lauwereins both placed envelopes containing cash on a table. Peter V. Pappas removed the contents of both envelopes and counted the money. The envelope Wille had brought contained $15,000. The envelope Lauwereins had placed on the table contained $14,100, $900 short of the $15,000 amount. McBride told Peter V. Pappas that McBride would get the missing $900 to Peter V. Pappas at a later date. Peter V. Pappas then put the money back in the envelopes and put the envelopes in his brief case. Peter V. Pappas said that he had to make a stop on the way down to Springfield. Peter V. Pappas also stated, "Five years ago when a man told you you had his vote, you could count on it; today you have to wait to see if he punches the button and the light lights up to know for sure."

Peter V. Pappas in September 1972, delivered $5,000 in cash in an envelope to Course which Course then delivered to various Democratic state senators.

On September 25, 1972, Peter V. Pappas met Pete Pappas, Carpentier and North at the Coffeehouse on Interstate 80 near Marseilles, Illinois and delivered $10,000 in cash in an envelope to Pete Pappas.

About a week before that meeting, Peter V. Pappas told Pete Pappas by phone that he (Peter V. Pappas) had the money and wanted to set up a meeting with Pete Pappas to deliver it. Peter V. Pappas mentioned a date that he was going to Springfield. Pete Pappas replied "Well, that date is all right with me. Why don't we meet at the Coffeehouse, which is on Interstate 80 and it would be on your left side as you are driving down Interstate 80." The meeting was set for 10:00 o'clock in the morning.

Immediately after the phone conversation with Peter V. Pappas, Pete Pappas telephoned Carpentier and said, "Donnie, I just had a call from Peter V. and he has the money and he wants to meet us at the Coffeehouse on Interstate 80 at 10:00 o'clock in the morning" on the date agreed upon. Pete Pappas asked Carpentier if Carpentier could make it. Carpentier said he could, and would ride up with Pete Pappas.

Pete Pappas told North by phone of the phone call from Peter V. Pappas. Pete Pappas told North that if North could make the meeting at the Coffeehouse, Pete Pappas would have something for him. North said that he thought he could. Pete Pappas said "Okay, fine."

Pete Pappas met Carpentier the morning of September 25, 1972 at the Moline Airport and drove to the Coffeehouse on Interstate 80 near Marseilles, Illinois. When Pete Pappas and Carpentier arrived at the Coffeehouse that morning North was already there. North, Carpentier and Pete Pappas had a cup of coffee while they were waiting for Peter V. Pappas to arrive. After waiting approximately twenty-five minutes, Carpentier placed a phone call to Peter V. Pappas' home in Lake Bluff and was told that Peter V. Pappas had left for Springfield. Another twenty minutes passed before Peter V. Pappas arrived and entered the Coffeehouse.

When Peter V. Pappas arrived at the Coffeehouse, he had a cup of coffee and asked Carpentier to call Peter V. Pappas' office in Springfield. Carpentier obliged. While Carpentier was on the phone North, Pete Pappas and Peter V. Pappas left the Coffeehouse.

Pete Pappas and Peter V. Pappas, upon leaving the restaurant, got into Peter V. Pappas' car. Peter V. Pappas sat behind the wheel and Pete Pappas sat on the passenger side. North walked out into the parking lot away from the car. In the car, Peter V. Pappas placed an envelope on the front seat of the car and said "Now, if anybody asked you if I gave you any money you say I didn't." Pete Pappas picked up the envelope containing the money from the seat and put it in his coat pocket. Peter V. Pappas said that he had already given Course his "five" and that he was going to see Craig later in Springfield.

Pete Pappas got out of Peter V. Pappas' car with the envelope, went over to his own car and got in. Pete Pappas then opened the envelope and counted out ten $100 bills. Pete Pappas got out of his car, walked over to North and gave North the ten $100 bills. North and Pete Pappas discussed having lunch at the LaSalle Holiday Inn and North got in his car and left.

When Carpentier joined Pete Pappas, Pete Pappas requested Carpentier to drive the car, which Carpentier did. During the ride from the Coffeehouse to the LaSalle Holiday Inn on Interstate 80, Pete Pappas counted out $5,000 in $100 bills and handed it to Carpentier. Carpentier put the money into his inside coat pocket. North, Carpentier and Pete Pappas had lunch together at the LaSalle Holiday Inn.

Carpentier and Pete Pappas arrived back in Rock Island about 3:30 p.m. that day. Carpentier then went to his insurance office in Moline and put the $5,000 he had received from Pete Pappas in a file box which he then put in a file drawer in the office.

A few days later, Carpentier had his wife type nine envelopes addressed to nine Republican senators, including an envelope addressed to Walker. The addresses were obtained from the legislative handbook. In the

envelope addressed to Walker, Carpentier put five $100 bills wrapped in a piece of paper. Carpentier placed a $100 bill in each of the other eight envelopes. Carpentier then took the nine envelopes which had proper postage and deposited them in the mail box by the side of the front door of his office.

On the morning of November 4, 1972, Pete Pappas, Course and Peter V. Pappas met with ready-mix industry members Wille, McBride, Lauwereins, and Herbert Craig for breakfast at a restaurant in Springfield. At that meeting there was a discussion whether a veto override of House Bill 4176 should be attempted. Course stated near the end of the meeting that an override was impossible since there were not enough votes, and Pete Pappas stated that he felt it would be better if an override of the Governor's veto was not attempted, but that a new bill could be pursued in the next session.

In the latter part of December 1972, Connolly and Peter V. Pappas returned to the bank in Lake Bluff and retrieved the $50,000 from the safe deposit box. Connolly took the money and returned portions of it to Wille, Lauwereins and Arquilla. Connolly kept the $3,160 which Meyer Material advanced to the $50,000 fund. Connolly placed that cash in the NIRMMA office safe, where it remained until trial.

After the commencement of the grand jury investigation which led to the indictment in this case, Carpentier was served with a subpoena to appear before the grand jury on May 30, 1973. On May 29, 1973, Carpentier informed Peter V. Pappas and Course of the receipt of the subpoena and was told by Peter V. Pappas, "Deny everything and if we all stick together, they won't have any case and when you get finished, call me in my office in Springfield." Carpentier appeared before the grand jury on May 30, 1973, and after his grand jury appearance called Peter V. Pappas. Carpentier told Peter V. Pappas that he (Carpentier) had denied everything before the grand jury and Peter V. Pappas said, "Great, if we all stick together like that, we will have no problem."

In August of 1973, Craig telephoned Pete Pappas and arranged a meeting with Pete Pappas at the Streid's Restaurant in Bloomington, Illinois. In attendance at the meeting were Craig, Peter V. Pappas, Pete Pappas and Lou Markert, a former legislator. Markert left the meeting at Peter V. Pappas' request. After Markert left, Peter V. Pappas told Craig and Pete Pappas that Peter V. Pappas had been visited at his home in Lake Bluff by Assistant U.S. Attorneys Skinner and Stone, who had discussed the cement bill legislation. Peter V. Pappas told Craig and Pete Pappas that he, Peter V. Pappas, could do one of three things in regard to the investigation. Peter V. Pappas said that he could say that he "ratholed" all the money, in other words, that he had got the money but kept it and did not pass any of it on. Peter V. Pappas said that another thing he could do was to tell the government everything he knew about it, and the other thing was not admit anything. Peter V. Pappas said that because he was being called to the grand jury, he would probably need to hire an attorney. He asked Craig and Pete Pappas if they would give him $5,000 apiece to help him pay his legal expenses. Peter V. Pappas also asked Craig and Pete Pappas to contact the other two participants and see if money could be obtained from them also. Peter V. Pappas said that he had been talking to Material Service Corporation but they had dropped him and were not going to help him in any way. Peter V. Pappas said that he heard that some of the executives of Material Service Corporation had received immunity on the case.

Also in the fall of 1973, Peter V. Pappas telephoned Carpentier and said, "that if the fellows would come up with $5,000 apiece, he would amend his tax return showing that he took $20,000 and we would all be off the hook." Neither Pete Pappas nor Carpentier ever gave Peter V. Pappas the $5,000 that Peter V. Pappas had requested.

II. Issues as to Recorded Conversations

All four appellants raised issues with respect to the conversations recorded by Carpentier and Pete Pappas. Prior to trial, defendants Craig, Walker, and Peter V. Pappas moved the district court to suppress those tape recorded conversations. Following a hearing, the district court denied their motion.

It appears from the record that defendant Carpentier had been called to testify before the grand jury investigating this case on two occasions, once in May and once in June (or July), 1973. In December of 1973 Carpentier engaged an attorney who conducted negotiations with the prosecution. By a letter agreement dated March 5, 1974, Carpentier agreed to plead guilty to one felony count of the impending indictment and to cooperate fully in the investigation in this case. The government, in return, agreed to dismiss other counts pertaining to Carpentier and to bring to the sentencing judge's attention Carpentier's cooperation with the government.

Thereafter, around the first of June, 1974, Carpentier permitted postal inspectors to attach a tape recording device to his office telephone. On June 10, defendant Walker telephoned Carpentier at his office. The conversation was recorded. Carpentier then immediately called Assistant United States Attorney Skinner to inform him of the call. Skinner told Carpentier to place a call to Walker, admonishing Carpentier not to disclose the fact that he was a government informant and to try to talk about money he had given Walker and to let Walker talk. Carpentier complied, and a second conversation between Carpentier and Walker was recorded. A third conversation was recorded on July 11, 1974. The record reveals that prior to any recordings, the government was aware that Walker had retained counsel.

Walker contends that the tapes of conversations recorded by Carpentier between himself and Carpentier should have been suppressed, and that the admission of the tapes into evidence at trial constituted error. In this regard, Walker argues that the government activity which resulted in the recording of his telephone conversations constituted an unreasonable search and seizure under the Fourth Amendment, a denial of due process under the Fifth Amendment, a denial of the right to counsel under the Sixth Amendment, and a violation of 18 U.S.C. § 2511.

We note at the outset the well-settled principle that there is no interest protectible by the Fourth Amend-

ment in those situations in which one party to a conversation reposes a trust or confidence in the other party who is actually an undisclosed government agent or informant. *E.g., Hoffa v. United States*, 385 U.S. 293 (1966). Simply put, no legitimate Fourth Amendment interest is involved in such situations, for that Amendment affords no protection to "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Id.* at 302. Nor is the Fourth Amendment violated because the undisclosed agent simultaneously records the conversation with an electronic recording device on his person, *Lopez v. United States*, 373 U.S. 427 (1963), or because the conversation is electronically transmitted by the undisclosed agent to a remote place where it is overheard by other agents and/or recorded. *United States v. White*, 401 U.S. 745 (1971); *On Lee v. United States*, 343 U.S. 747 (1952). Evidence in the form of tape recordings of such conversations are generally admissible where one party to the conversation consents to the electronic recording. *Rathbun v. United States*, 355 U.S. 107 (1957); *United States v. Bastone*, 526 F.2d 971 (7th Cir. 1975), *cert. denied*, 425 U.S. 973 (1976); *United States v. Martin*, 372 F.2d 63 (7th Cir. 1967); *cert. denied;* 387 U.S. 919 (1967). There is no doubt from the record that Carpentier voluntarily consented to the recording of his conversations with Walker.[13]

[13] Conceding that the record fully supports the district court's finding that Carpentier had given prior consent to the recordings, Walker nevertheless contends that the consent of Carpentier was under the peculiar circumstances of this case the consent of the government itself, and, hence, without legal effect. Arguing that there were no exigent circumstances to justify the government's failure to obtain a court order for the interception of the communications pursuant to 18 U.S.C. § 2518, Walker asserts that Carpentier's consent without judicial approval should be held for naught. We do not agree. Congress has seen fit to condone the interception of communications where the person intercepting is acting under color of law and has given his prior consent thereto. 18 U.S.C. § 2511(2)(c). We find, and Walker concedes, that the record amply supports the district court's determination that the conversations and the circumstances under which those conversations were recorded fall within 18 U.S.C. § 2511(2)(c). Even if a finding of valid consent could be held for naught in view of the peculiar circumstances of a given case, we find no such peculiar circumstances in the record before us.

Further, Walker's contention that his Fifth Amendment rights were violated since he should have been made aware of his rights prior to making any statement is of no avail. Advice of rights is required in custodial situations where the inherent pressures to speak in the face of governmental authority are present. *Beckwith v. United States*, 425 U.S. 341; *United States v. Gardner*, 516 F.2d 334 (7th Cir. 1975), *cert. denied*, 423 U.S. 861 (1975). As Judge Bauer stated in *United States v. Bastone, supra*, 526 F.2d at 977:

> "A person is not entitled to warnings simply because an investigation has been focused upon him. The test is not focus alone, but rather focus plus custodial interrogation. *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed. 2d 977 (1964); *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966)."

While it is clear the investigation had focused upon defendant Walker, his recorded conversations with Carpentier involved no confrontation with governmental authority in the context of a custodial interrogation calling for *Miranda* warnings. Consequently, we must reject Walker's contention that the recordings violated his Fifth Amendment rights.

Nor did the recordings violate Walker's Sixth Amendment right to counsel. By its own terms, the Sixth Amendment affords the right of counsel "[i]n all criminal prosecutions." For purely Sixth Amendment purposes, a defendant's right to counsel attaches only at or after the time the adversary judicial proceeding has been initiated against him. *Kirby v. Illinois*, 406 U.S. 682, 688 (1971) (plurality opinion of Stewart, J.); *Massiah v. United States*, 377 U.S. 201 (1964). See also: *Brewer v. Williams*, ... U.S. ....., 97 S.Ct. 1232 (1977). One accused of a crime is said to be entitled to counsel at any "critical" stage of the prosecution. *United States v. Wade*, 388 U.S. 218, 236 (1967); *Gilbert v. California*, 388 U.S. 263, 267 (1967); *Simmons v. United States*, 390 U.S. 377, 383 (1968). Walker's right to counsel argument must fail for the simple reason that

there had not yet been a "criminal prosecution" when his conversations with Carpentier were recorded.[14]

Nevertheless, Walker argues that at the time of the recorded conversations the government was no longer simply investigating him. Walker asserts that because Carpentier would testify that he had bribed Walker and because other witnesses would provide evidence needed to establish other elements of the scheme, his indictment "was then as certain as the sun setting in the West and that it was being deferred merely to permit the government to beef up its case with admissions to be obtained by stealth and trickery." Walker concludes by stating that "the indictment was being withheld, perhaps with the conscious purpose of avoiding any right to counsel problems."

The record does not support Walker's contentions. Nothing therein indicates that the government withheld the indictment for any purpose whatsoever. Furthermore, in an investigation into a complex scheme involving as many persons, occurring in as many places, and carried on as long as the scheme established by the government in this case, we are compelled to reject Walker's unadorned contention that his formal charge was withheld for the purposes asserted here. In any event, the government is certainly not required to cease an on-going investigation into a far-reaching scheme such as this when it appears to have probable cause to seek an indictment as to one individual. *Cf. Hoffa v. United States, supra; United States v. Gardner, supra; United States v. Skelley,* 501 F.2d 447 (7th Cir. 1974), *cert. denied,* 419 U.S. 1051 (1974).

Recognizing that his individual claimed violations of Fourth, Fifth and Sixth Amendment rights alone are

[14] Nor does it make a difference that the government knew prior to the recordings that Walker was represented by counsel. The violation of the Sixth Amendment right to counsel as claimed here is to be viewed in the context of whetner the claimed violation occurred in a critical stage of a *prosecution,* and not in the context of whether defendant had retained counsel in face of a government investigation. Compare *United States v. Lemonakis,* 485 F.2d 941, 954 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 989 (1973).

insufficient to warrant reversal, Walker submits that the totality of the circumstances in this case requires us to hold that the government activity exceeded permissible bounds. We reject Walker's totality of the circumstances argument because, for the reasons stated with respect to the individual claimed violation of rights, we find no support in the record for the assertion that the activity of the government exceeded permissible bounds. However damning the effect of the tape recordings upon Walker's case, we find nothing in the record to indicate that his rights were violated by the recordings of conversations with Carpentier, or the admission into evidence of those recordings.

Defendant Peter V. Pappas also contends that tapes of conversations between himself and Pete Pappas on September 27, 1973 and October 15, 1973 should have been suppressed. The tape recordings of those conversations were inadmissible, Peter V. Pappas argues, because Pete Pappas was neither acting under color of law nor had given prior consent to the interception of their conversations within the meaning of 18 U.S.C. § 2511(2)(c).[15]

The record shows that on October 17, 1973, Pete Pappas and the government entered into a letter agreement by which Pete Pappas agreed to enter a plea of guilty to a violation of 26 U.S.C. § 7206(1) [making a false statement in an income tax return], to cooperate fully with the government in its investigation, to not run for re-election as a State Representative, and to resign from office prior to testifying at trial. In return, the government agreed not to prosecute Pete Pappas any further, not to use any information he supplied against

[15] 18 U.S.C. § 2511(2)(c) provides as follows:

"It shall not be unlawful under this Chapter for a person acting under color of law to intercept a wire or oral communication, where such a person is a party to the communication or one of the parties of the communication has given prior consent to such interception."

him in any way, and to recommend probation at the time of sentencing.[16]

Peter V. Pappas argues that Pete Pappas' recordings of two conversations prior to entering into the plea agreement were accomplished for purely selfish purposes designed to increase his (Pete Pappas') value to the government as a witness. In support of this argument, Peter V. Pappas points out that Pete Pappas, through his attorney, offered to tape the conversations, and that the government could not use the tapes unless and until it had reached an agreement with Pete Pappas. As such, Peter V. Pappas concludes, Pete Pappas was not acting "under color of law." We do not agree. Our review of the record indicates that Pete Pappas agreed to cooperate with the government prior to recording any conversations with Peter V. Pappas. Pete Pappas' attorney suggested the recordings during the course of plea negotiations because Peter V. Pappas had been demanding money from Pete Pappas for use as attorney's fees, and the attorney was concerned that by giving Peter V. Pappas money, Pete Pappas might become involved in "an obstruction of justice situation" if it later turned out that the money was not for attorney's fees but rather for use as an encouragement not to testify. The prosecutor, then Assistant United States Attorney Skinner, agreed that if plea negotiations with Pete Pappas fell through, there would be no use of the recorded material against Pete Pappas.

Every aspect of the recording of the conversations on September 27 and October 15 was supervised by the

[16] The agreement recited that Pete Pappas would provide information concerning various legislators and their relationship with members of the organized crime syndicate in Chicago, and that his incarceration after a guilty plea and cooperation represent a serious threat to him and his family. On the same day he signed the agreement, October 17, 1973, Pete Pappas, his attorney, and the prosecutor appeared before Judge Morgan of the United States District Court for the Southern District of Illinois, at which time the plea agreement was disclosed to the Judge. Pete Pappas entered a plea of guilty as agreed on January 20, 1975. He was sentenced to a one year probationary term.

government. Pete Pappas only taped those conversations which the government directed him to record. The government supplied the recording equipment and an agent who operated the equipment. The agent remained nearby until Pete Pappas had finished recording. After each recording, the agent took custody of the equipment and the original tapes. Under our view of the record, whatever may have been Pete Pappas' motive in cooperating with the government, he was "acting under color of law" within the meaning of 18 U.S.C. § 2511(2)(c).

Peter V. Pappas also contends that Pete Pappas had not given his prior consent to the recording of the conversations to which he was a party. In this regard, Peter V. Pappas argues that prior to the written agreement of October 17, 1973, the government was precluded from using the tapes of any of Pete Pappas' recorded conversations against him because, prior to that date, the government did not have Pete Pappas' consent. In substance, Peter V. Pappas argues that Pete Pappas withheld his consent to the interception of the conversations to which he was a party until the date of the written agreement.

We reject this argument because it is not supported by the record, and, further, because it assumes that there can be no valid prior consent under these circumstances until there is a formal plea agreement. We find no support, and Peter V. Pappas had demonstrated none, for such an assumption. It is clear from the record that Pete Pappas gave his prior consent to the interception and recording of the conversations.[17]

[17] The facts in this case are demonstrably distinguishable from the facts in *Weiss v. United States*, 308 U.S. 321 (1939), relied upon by Peter V. Pappas. *Weiss* involved the interceptions of communications of which the participants were ignorant and to which they did not consent. 308 U.S. at 330. In this case, the record indicates that Pete Pappas knew and consented to the interceptions.

Defendant Craig also contends[18] that the district court erred in denying the pre-trial motion to suppress evidence in the form of tape recordings of conversations made by Pete Pappas in which Craig was a participant.[19] Craig argues that Pete Pappas was instructed by the government to elicit confessions of culpability in past events by indulgence in cajolery, mutual sympathy, and false pretenses. Further, Craig points out that as far as the September 27, 1973 conversation was concerned, Pete Pappas' mission was to tape only a conversation with Peter V. Pappas. Under such circumstances, Craig argues, Pete Pappas was obliged to advise Craig of his true function as a government agent, and that the government cannot rely on 18 U.S.C. § 2511(2)(c).

We find no merit to Craig's attempted distinction between culpable statements contained in recorded conversations occurring during the commission of an offense, and such statements occurring after the commission of an offense. The indictment charged, and the evidence showed, a conspiracy among the defendants and various unindicted co-schemers (among whom was Pete Pappas) occurring over an extended period of time. The recordings of which Craig complains were made during the existence of the alleged and proven conspiracy. Furthermore, Craig voluntarily participated in the conversations, albeit without knowledge of Pete Pappas' true function as an individual cooperating with the government in its investigation.[20] At the time of the

[18] Craig adopts partially the arguments of defendant Walker with respect to the issue of the admissibility of tape recordings of conversations between a defendant and an undisclosed government agent. To the extent that Craig adopts Walker's arguments, we reject those arguments for the reasons expressed in connection with defendant Walker's contentions.

[19] Craig, Peter V. Pappas, and Pete Pappas participated in a conversation on September 27, 1973, at a hotel in Chicago. Pete Pappas recorded that conversation. Craig and Pete Pappas also participated in a conversation which Pete Pappas recorded on October 23, 1973, at a motel in Springfield.

[20] We also reject Craig's claim that under the circumstances of this case Pete Pappas was obliged to reveal his status as an informant. Our reasons for doing so are expressed in connection with an identical claim made by defendant Walker, *supra*, with respect to *Miranda* warnings.

recorded conversations, Pete Pappas' trustworthiness and confidentiality were characteristics which Craig necessarily risked, and Craig cannot be heard to complain when it is afterwards learned that Pete Pappas actually had been a government informant and evidence of damaging conversations are late introduced at trial. *See, e.g., Hoffa v. United States, supra; United States v. White, supra; United States v. Lemonakis, supra.*

Craig further contends that the tapes of his conversations should not have been admitted into evidence "for want of preserving their integrity." In substance, Craig argues that no chain of custody of the tape recordings was proven at trial. Specifically, Craig complains of the admission into evidence of tapes of conversations occurring between himself and Pete Pappas on September 27, 1973[21] and October 23, 1973.

The record shows that government exhibit 101-0 and 103-0 purported to be the original tape recordings of the September 27, 1973 and October 23, 1973 conversations respectively.[22] Pete Pappas testified that immediately prior to his September 27 meeting with Craig and Peter V. Pappas at a hotel in Chicago, he went to the room of Postal Inspector D'Hooge in the same hotel, where D'Hooge outfitted him with a tape recorder. After departing D'Hooge's room, Pete Pappas proceeded to an area of the hotel where he conversed with Craig and Peter V. Pappas. The conversation was recorded by Pete Pappas who, immediately after the conversation, returned to D'Hooge's room where the tape recorder was removed from his person. D'Hooge kept the tape.

Pete Pappas further testified that almost two-and-one-half years later, on February 7, 1976, he listened to the tape recording of the September 27, 1973 conversation (government exhibit 101-0), recognized and identified his voice as well as the voices of Craig and Peter V.

[21] Peter V. Pappas was also a party to this conversation and was taped.

[22] A copy of these "-0" series recordings were given to defense counsel prior to trial, and the original tapes were made available for inspection.

Pappas, and noted that some parts of the tape were unintelligible. Pete Pappas stated that the tape recordings truly and accurately portrayed the conversations in which he had participated on September 27, 1973. He also testified that a typed transcript of the tape recording was a true and accurate transcript. Pete Pappas testified similarly with respect to the tape recording of the October 23 conversation (government exhibit 103-0) and other conversations he recorded (government exhibits 102-0 and 104-0).[23]

The next witness with respect to the tapes was Professor Weiss, who was qualified and accepted by the district court as an expert. Weiss testified that Postal Inspectors D'Hooge and Kelm visited his New York offices in March, 1976, with the tapes in question, that he subjected the tapes to scientific analysis for purposes of determining the existence of splices or alterations, and that, in his opinion, the tapes contained "no indication of alteration whatsoever." Weiss further testified that he made two identical copies of the tapes on sophisticated, high quality machines. Weiss improved the audibility of those copies by removing background noises, etc.—"a procedure to make the sound of speech closer to that which you would have obtained using a more ideal recording situation." Weiss kept one copy of each tape for himself, and placed the other copies in sealed bags, signing the seal on each bag. Weiss then handed the sealed recordings to the Postal Inspectors. These copies were subsequently numbered government exhibits 101-1, 102-1, etc. corresponding to the original "-0" series, and Weiss stated from the witness stand that none of these exhibits had been tampered with.

Weiss further testified that later (May, 1976), at the direction of representatives of the government, he deleted certain portions of the "-1" tapes. These tapes were then labelled 101-3, 102-3, etc. Transcripts corresponding to the "-3" series were labelled 101A, 102A, etc. The district court found that a proper foundation had been established for the "-3" tapes with the deletions

[23] Pete Pappas did not testify as to the contents of the conversations he recorded, and his cross examination was postponed until after the tapes were played for the jury.

and enhanced audibility and admitted those tapes into evidence and allowed them to be played for the jury.

No chain of custody of the tapes was proven at trial. Notwithstanding this lack of proof, however, we feel that the tapes were admissible because a proper foundation had been demonstrated. The purpose of the chain of custody rule is to insure that the item offered into evidence is in substantially the same condition as it was at the time the proponent of the evidence came into its possession. *Cf. United States v. Santiago*, 534 F.2d 768 (7th Cir. 1976); *United States v. Brown*, 482 F.2d 1226 (8th Cir. 1973). The purpose of the rule is served where, as here, a proper foundation demonstrating the accuracy and trustworthiness of the evidence is laid. Pete Pappas testified that he participated in the taped conversations, and that the tapes truly and accurately portrayed the conversations in which he participated. Further, the expert witness Weiss testified that in his opinion the tapes contained no alterations. The district court was satisfied that a proper foundation had been established for the admissibility of the tapes. We agree that there was sufficient evidence that the tape recordings were authentic. On the basis of the record before us we cannot say that the district court abused its discretion in admitting the tapes into evidence. See *United States v. Biggins*, 551 F.2d 64 (5th Cir. 1977); *United States v. Cosby*, 500 F.2d 405 (9th Cir. 1974); *Monroe v. United States*, 234 F.2d 49 (D.C. Cir. 1956); *Todisco v. United States*, 298 F.2d 208 (9th Cir. 1961).

This case is thus markedly different from *United States v. Starks*, 515 F.2d 112 (3rd Cir. 1975), on which Craig relies. In the *Starks* case the government relied on a presumption that when evidence of a physical nature has been introduced, the trial court is entitled to assume that public officials did not tamper with exhibits in their possession in the absence of some evidence suggesting otherwise. The court there held that "when a colorable attack is made as to a tape's authenticity and accuracy, the burden on those issues shifts to the party offering the tape and the better rule requires that party to prove its chain of custody." *Id.*, 515 F.2d at 122. The court further held that it was error for the trial court to

shift to defendant the burden of proving unauthenticity. *Id.* In the instant case, the government did not rely on any presumption of regularity, but rather affirmatively demonstrated the accuracy of the recordings and the absence of any tampering.

Craig also contends that the tapes were inadmissible because their chain of custody was not effectuated pursuant to 18 U.S.C. § 2518(8)(a).[24] Craig argues that although consensual recordings of conversations under color of law pursuant to 18 U.S.C. § 2511(2)(c) may be an exception to court approved interception as established by 18 U.S.C. § 2518, Congress intended the guarantees of integrity found in 18 U.S.C. § 2518(8)(a) to be made applicable to consensual recordings. Craig, however, points to nothing in the legislative history of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, 84 Stat. 112, 18 U.S.C. § 2510 *et seq.* to support this contention. Indeed, our research reveals that Congress was primarily concerned with the intrusions into privacy caused by "the widespread use and abuse of electronic surveillance techniques." S. Rep. No. 1097, 90th Cong., 2d Sess. reprinted

[24] § 2518(8)(a) provides:

"The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such a way as will protect the recording from editing or other alteration. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his direction. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsection (1) and (2) of § 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of § 2517."

in 2 U.S. Code Cong. & Admin. News, 2112, 2154 (1968). Section 802 of the Act, 18 U.S.C. § 2518, was enacted to delineate "on a uniform basis the circumstances and conditions under which an interception of wire and oral communications may be authorized." *Id.*, at 2153. But consensual interceptions were specifically exempted from those interceptions which would otherwise be unlawful for failure to comply with the Act. 18 U.S.C. § 2511. Congress created this exception largely because it "largely reflects existing law." *Id.*, p. 2182. Since consensual interceptions are significantly different from non-consensual interceptions, and since nothing in the Act or its legislative history indicates that the recordings of consensual interceptions were intended by Congress to be subject to 18 U.S.C. § 2518(8)(a), we reject Craig's contention.

Craig also contends that reversal of his conviction is required because the court reporter did not transcribe the conversations contained on the tape recordings played for the jury in violation of the Court Reporters Act, 28 U.S.C. § 753(b).[25] Pointing to authorities[26] holding that the requirements of the Act are mandatory, Craig argues that the dispute below was "what was heard in the court." (Reply Br. of Defendant Appellant Craig, p. 21). We find no merit in this contention. The tape recordings played to the jury and the transcript of those recordings are part of the record on appeal to this Court. Thus, we have the most accurate record of what was heard by the jury, and the fact that the court reporter did not transcribe the contents of the tape recordings in no way impedes our review of the

[25] 28 U.S.C. § 753(b) provides in relevant part:

"One of the reporters appointed for each such court shall attend at each session of the court . . . and shall record verbatim by shorthand or by mechanical means . . . (1) all proceedings in criminal cases had in open court. . . ."

[26] *E.g. Calhoun v. United States*, 384 F.2d 180, 183-184 (5th Cir. 1967), and cases cited therein.

proceedings below.[27] Because the tape recordings played to the jury are part of the record on appeal, we find substantial compliance with 28 U.S.C. § 753(b).

Defendant North's contention with respect to the tapes is of a different nature. North argues that the district court erred in not granting him a severance from the other defendants based upon the government's use of recordings and transcripts which contained deletions.[28] North asserts that if he had been tried alone, the tapes would have been inadmissible. North was neither mentioned in the tapes nor was a conversation in which he participated recorded.

It is well established that a severance should not be granted except for the most cogent of reasons. *E.g. United States v. Crouch*, 528 F.2d 625 (7th Cir. 1976). Essential to a successful motion for severance is the strong showing of prejudice as a result of its denial. *United States v. Cervantes*, 466 F.2d 736, 739 (7th Cir. 1972). Prejudice, as required for severance, means that the movant will be unable to secure a fair trial unless the severance is granted. A showing that a separate trial will offer a better chance of acquittal is plainly inadequate. *United States v. Blue*, 440 F.2d 300 (7th Cir. 1971).

In attempting to make the requisite strong showing of prejudice, North argues, as he did below, that any deletion from the sound recordings would create an unmistakable inference in the minds of the jurors that

[27] Craig argues here as he did below that because he considered the tape recordings unintelligible, he is prejudiced by the failure of the court reporter to transcribe what the reporter heard when the tapes were played, and that the government-prepared transcripts of those tapes are at best its interpretation of the contents of the taped conversations. This argument overlooks our ability to listen to the tapes and determine the accuracy of the government-prepared transcripts.

[28] The government's expert witness, Professor Weiss, excised certain portions of the tapes at the direction of the government. Such excisions, done with the prior knowledge of all the parties concerned, were effectuated to comply with *Bruton v. United States*, 391 U.S. 123 (1968). Other than North's contention, no issue is raised as to these deletions.

something very damaging to him had been suppressed. We cannot agree with this argument. We find nothing in the record to indicate that the *Bruton* excisions created any inference in the minds of the jurors. To the contrary, the district court instructed the jury both at the time the tapes were played and immediately prior to its deliberation that the taped conversations were to be considered only against participants in those conversations. Moreover, the court also instructed the jury at the time the tapes were played to disregard the excisions.[29] Having failed to demonstrate that the denial of this severance request resulted in any prejudice, we reject North's contention.

III. Issues as to Mail Fraud

Defendants Craig, Peter V. Pappas, and Walker contend that the evidence tending to prove the mailings alleged in the indictment was legally insufficient to support their convictions for mail fraud under 18 U.S.C. 1341.[30] The indictment charged eleven mailings, one in

[29] Judge Leighton stated in part: "One final point about these recordings: these recordings have been subjected, as you heard Professor Weiss testify yesterday, to certain deletions and processing which have been necessary. These deletions were done with the knowledge of all the parties in the case and they were proper and legal and you need not be concerned about the legal basis for these deletions or the reasons for the deletions. You should consider the entire tape and disregard the fact that they have been subjected to deletions and excisions in determining the guilt or innocence of any of the defendants in this case."

[30] The Mail Fraud Statute provides:

> "Whoever having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any

(Footnote continued on following page)

each of Counts Two through Twelve. The mailing alleged in the indictment and proven by the government at trial consists of the following:

Counts Two to Five	—Notices and Agenda of MVLC Meetings of December 1971 and January 1972, mailed by the MVLC Secretary to McBride and Connolly.
Counts Six and Seven	—Dues Abatement letters from NIRMMA to Edmier, Inc. and Accurate Ready-Mix.
Counts Eight and Nine	Fraudulent Expense Vouchers mailed by Arquilla and Lauwereins to NIRMMA for purposes of covering a $3160 shortage in the bribe fund.
Counts Ten and Eleven	Bulletins from ID-MRCA and NIRMMA urging members to contact the Governor to urge him to sign House Bill 4176.
Count Twelve	—$500 cash payoff from Carpentier to Walker.

Our inquiry begins with *Pereira v. United States*, 347 U.S. 1, 8-9 (1954):

> "The elements of the offense of mail fraud . . . are (1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme.

[30] *continued*
matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

> It is not necessary that the scheme contemplate the use of the mails as an essential element. *United States v. Young*, 232 U.S. 155 . . . ."

To support a conviction for mail fraud, the mailings must be closely enough related to the fraudulent scheme. *See Ohrynowicz v. United States*, 542 F.2d 715 (7th Cir. 1976); *United States v. Britzman*, 542 F.2d 380 (7th Cir. 1977). In determining the relationship between the mailings and the fraudulent scheme, our inquiry concerns whether the uses of the mails that were charged in the indictment and shown by the evidence properly may be said to have been for the purpose of executing the scheme within the meaning of 18 U.S.C. § 1341. *See United States v. Maze*, 414 U.S. 395, 400 (1974); *United States v. Sampson*, 371 U.S. 75, 76 (1962); *Parr v. United*, 363 U.S. 370, 385 (1960).

The mailings charged and proven in Counts Two through Five consisted of notices and agenda of the December, 1971 and January, 1972 meetings of the MVLC. These notices were mailed to ready-mix industry representatives McBride and Connolly by the MVLC secretary, who addressed the notices from a mailing list. Connolly, the Executive Secretary of NIRMMA, had requested that NIRMMA be placed on the mailing list. Both Connolly and McBride were charged as and shown to be co-schemers with the defendants.

The government's evidence established that the defendants and co-schemers/co-conspirators conspired to devise a bribery scheme by which the citizens and honest legislators of Illinois would be deprived of their right to honest government. The object of the scheme was the passage of a law through the Illinois Assembly giving highway weight relief for ready-mix industry cement trucks. The record shows that the MVLC was the body which initially reviewed the proposed weight relief legislation and made recommendations to the General Assembly. Thus, the introduction in the MVLC of what eventually became the "cement bill" was a strategic and essential step, envisioned, planned and carried out by the co-schemers. The mailings of the notices of meetings of the MVLC to NIRMMA representatives, upon the

request of Connolly, served to keep the industry co-schemers advised as to the status of their sought-after legislation. The record shows that after the receipt of the notices, the schemers met to prepare their presentation in support of the proposed change in the truck weight limitations law. We conclude that the introduction of the "cement" bill in the MVLC, among whose membership included Pete Pappas, Course, and Carpentier, was an essential part of the scheme. We further conclude that the mailings of the notices of the MVLC meetings to names on the mailing list maintained by the secretary were incidental to that essential part of the scheme. *Cf. Pereira v. United States, supra.* The MVLC notices were requested by Connolly of NIRMMA to keep the industry co-schemers apprised of MVLC developments with respect to the "cement bill" proposal. With such information acquired through the mail, the industry schemers' actions could be planned accordingly.

Although it is clear that not all of those charged with participating in the scheme knew that the notices would be mailed to persons on the MVLC mailing list in the ordinary course of the MVLC's business, those who were not aware of the mailings are nevertheless responsible for the mailings caused by other members of the scheme in its furtherance. *United States v. Joyce*, 499 F.2d 9 (7th Cir. 1974), *cert. denied*, 419 U.S. 1031 (1974); *United States v. Isaacs*, 493 F.2d 1124 (7th Cir. 1974), *cert. denied sub nom. Kerner v. United States*, 417 U.S. 976 (1974); *United States v. Keane*, 522 F.2d 534 (7th Cir. 1975), *cert. denied*, 424 U.S. 976 (1976).

Because the mailings represented in Counts Two through Five were incidental to an essential part of the overall scheme, and because the mailings furthered the execution of the scheme, the mailings of the MVLC notices are significantly different from the mailings found to be legally insufficient in *Parr v. United States, supra*, and *United States v. Staszcuk*, 502 F.2d 875 (7th 1974), *cert. denied*, 423 U.S. 837 (1975), both of which cases are relied upon by defendants. *Parr* was a prosecution of school board officials for misappropriation of school tax funds. The Supreme Court held under the circumstances of that case that the legally compelled

use of the mails by defendant to send tax assessments, receipts, and notices of reassessment hearings was not shown to be in furtherance of the scheme. *Parr, supra*, 363 U.S. at 391. In *Staszcuk*, the defendant city alderman was convicted, *inter alia*, of violations of 18 U.S.C. § 1341 in requiring payments for his approval of zoning changes. The mailings charged to be in furtherance of the scheme consisted of notices of hearings sent by a zoning committee of the City Council to occupants of buildings near the property which was subject to the proposed zoning amendment. We concluded that the mailings charged and proven by the government conflicted with rather than promoted the defendant's scheme to defraud, and, hence, were not in furtherance of the scheme. *Staszcuk, supra*, 502 F.2d at 880-881.

Parr and *Staszcuk* are inapplicable here. The MVLC mailings were directed to those co-schemers who had asked to be placed on the mailing list. The notices served to inform the recipients of the status of their sought-after proposal in the MVLC so that the steps necessary to secure its passage could be taken. We feel that the mailings of the MVLC notices to McBride and Connolly were closely enough related to and promoted the fraudulent scheme. As such, Connolly caused the mailings of the notices for purposes of executing the fraudulent scheme.

The mailings involved in Counts Six and Seven consist of letters from NIRMMA to its members advising them of a suspension of dues.[31] The evidence showed that at the NIRMMA convention in Miami in February, 1972, it was proposed that member companies be assessed $40.00 per truck as their contribution to the $50,000 bribe fund. At a subsequent NIRMMA transportation committee meeting, this plan was agreed upon and carried out. In March, 1972, the NIRMMA Board of Directors decided to abate the dues of member firms and mailed letters so informing the members of that decision. As Craig allows, the record indicates that

[31] Ostensibly the reason given in the letters for the dues abatement was a surplus in the NIRMMA treasury.

the "reason for these letters was to soften the blow occasioned by the assessment to make up the $50,000.00 fund." (Brief of Defendant Craig, p. 20). The record shows that Accurate Ready-Mix Concrete Company (Count Six) and Edmier, Inc. (Count Seven) received these letters through the mail.[32]

The mailings which formed the basis for Counts Eight and Nine consist of false expense vouchers mailed by Arquilla and Lauwereins to the NIRMMA office. When the $50,000.00 bribe purse was assembled in the NIRMMA office in March, 1972, Meyer Material advanced $3160.00 to cover a shortage. False expense vouchers were then submitted to NIRMMA. Connolly prepared checks to pay the false expense vouchers. When cashed, Connolly reimbursed Meyer Material for the $3160.00.

It is clear from the record that the collection of the $50,000.00 bribery fund was an essential part of the scheme, and that the mailings charged in Counts Six through Nine were done as incidental aspects of the task of assembling the fund. Because the collection of the bribe fund was an essential part of the scheme, and because the mailings charged in Counts Six through Nine were incidental to that essential aspect of the scheme, *Cf. Pereira v. United States, supra*, 347 U.S. at 8, we conclude that those mailings were done for purposes of executing the scheme to defraud, and, as such were sufficient to support convictions for mail fraud.

Craig argues that the mailings of the false expense vouchers (Counts Eight and Nine) constituted an entirely different fraud perpetrated against NIRMMA. Craig claims that the mailings involved in those fraudulent acts could not have been foreseen by the defendants. We understand this contention to mean that Craig did not cause the use of the mails in Counts Eight and Nine within the meaning of § 1341. But a schemer

[32] Craig challenges the proof of the use of the mails with respect to Edmier's receipt of the abatement letter. Our review of Edmier's testimony compels us to reject that challenge.

causes the use of the mails when he has knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, although not actually intended. *Pereira v. United States, supra*, 347 U.S. at 8-9. Furthermore, each member of a mail fraud scheme is responsible for the use of the mails caused by other members in the execution of the scheme. *United States v. Joyce, supra*, 499 F.2d 9, 16.

Undoubtedly Craig had no concern for the methods utilized by the industry co-schemers in raising the bribe fund, probably never intended that false expense vouchers would be submitted through the mails to assemble part of the fund, and probably could not foresee such a procedure. The same, however, cannot be said of Craig's counterparts in the ready-mix industry. The mailings were clearly caused by them, and the fact that Arquilla and Lauwereins used the mails to submit false expense vouchers in furtherance of the fund's collection process was certainly a reasonably forseeable use of the mail. Since the industry schemers could reasonably foresee the use of the mails in the execution of the fund-raising aspect of the scheme, and since the defendants are responsible for such use of the mails by their industry counterparts, defendants must be held responsible for the mailings represented in Counts Eight and Nine.

The mailings charged in Counts Ten and Eleven consist of bulletins mailed by ID-MRCA and NIRMMA directing their respective membership to contact the governor and to urge him to sign the cement bill into law.[33] Craig argues that the defendants had no contemplation that the possibility of a veto was any part of the scheme and, thus, contemplation of the use of the mails to prevent a veto could hardly have been envisioned or reasonably anticipated. In a similar vein, Peter V. Pappas argues that the mailings in Count Ten and Eleven were not sufficiently related to the scheme

[33] Craig challenges the proof with respect to the mailing charge in Count XI, a bulletin sent to Meyer Material Company. We have reviewed the evidence with respect to that mailing and find that it sufficiently proves the use of the mails.

because the conspiracy was never alleged to encompass improper influence on the Governor. These arguments miss the mark. At the time of the mailings charged in Counts Ten and Eleven of the indictment, the scheme was on the brink of fruition, at least from the point of view of the industry schemers. It was an essential part of the scheme that the cement bill be enacted into law. As such, the mailings of the bulletin to the members of the NIRMMA and ID-MRCA urging those members to press the Governor to sign HB 4176 into law were clearly within furtherance of the scheme and properly chargeable to the co-schemer defendants.

Count Twelve charges the mailing of five hundred dollars to defendant Walker. It was shown at trial that Carpentier placed $500.00 in an envelope and mailed it to Walker in fulfillment of their prior agreement that Walker would receive $500.00 for handling the cement bill in the Senate. We have no difficulty in concluding that this distribution of the proceeds of the bribe fund was in furtherance of the scheme. *Cf. United States v. Barrett*, 505 F.2d 1091, 1104 (7th Cir. 1975), *cert. denied*, 421 U.S. 964 (1975); *United States v. Isaacs*, *supra*.

With respect to each of the above mailings, which we have found to be in furtherance of the scheme, defendants Craig, Peter V. Pappas, and Walker assert variously that they cannot be said to have caused the mailings, or that they could not have anticipated such use of the mails, or that they had no knowledge of or participation in the mailings. Hence, defendants contend, the evidence of mailings is insufficient to support a conviction under § 1341. Defendants' arguments, however, ignore the principle that they do not have to use or personally cause the use of the mails in furtherance of the scheme to be held responsible under the Mail Fraud statute. As we stated previously, members of mail fraud schemes are responsible for the mailings caused by co-schemers in the execution of the scheme. When the existence of an agreement to participate in a scheme to defraud is established, and when mailings in furtherance of the scheme are caused by some of the schemers, criminal liability for the mailings is properly attributable to other schemers regardless of whether

they knew of, approved, agreed to, or contemplated specific uses of the mails.

In sum, we conclude that the jury could properly find that the mailings represented in Counts Two through Twelve were effectuated for the purposes of executing the scheme, and that those mailings were caused by the defendants.

IV. Conspiracy Issues

Defendant Peter V. Pappas contends that the district court erred in failing to incorporate in instructions defining conspiracy to commit mail fraud the requirement that the defendants intended to use the mails.[34] Because we find no such requirement, we reject this contention.

With respect to the conspiracy count, the district court instructed the jury, in part, that:

> "To convict any defendant of this offense the Government must prove beyond a reasonable doubt the existence of a conspiracy to commit the offense of mail fraud, that the defendant, with knowledge of the purpose of the conspiracy, and reasonably foreseeing a use of the mails in furtherance thereof, willfully became a member of the conspiracy . . . .
>
> "It is necessary . . . that the government prove beyond a reasonable doubt that a defendant was aware of the common purpose, and could reasonably foresee the use of the mails in furtherance of that common purpose, and was a willing participant with intent to advance the purpose of the conspiracy . . ."

Peter V. Pappas argues that the jury should have been instructed that a defendant can be found guilty of conspiracy to commit mail fraud only if it is shown that he agreed to join the conspiracy with the knowledge that

[34] Defendant Walker, whose argument is adopted by defendant Craig, similarly contends that the government was required to prove that a violation of the mail fraud statute was an object of the conspiracy.

the conspiracy contemplated the *unlawful* use of the mails.

In support of his contention, Peter V. Pappas points to the following sentence in *Pereira v. United States, supra*, 347 U.S. 1, 11: "The essence of the conspiracy charge is an agreement to use the mails to defraud . . . ." But this language in *Pereira* is mentioned in the context of a double jeopardy issue. In response to the contention that a conviction on both substantive mail fraud counts and conspiracy to commit the crime charged in the substantive count constituted double jeopardy, the court in *Pereira* found double jeopardy no bar to a conviction on both substantive counts and a conspiracy count. The court noted that the "charge of conspiracy requires proof not essential to the convictions on the substantive offenses—proof of agreement to commit an offense against the United States—and it cannot be said that the substantive offenses and the conspiracy are identical, . . ." *Id.*, at 11-12. Hence, we cannot view the Court's statement that "the essence of the conspiracy charge is an agreement to use the mails to defraud" as support for the proposition that the government must prove that defendants agreed to join the conspiracy with knowledge that the conspiracy contemplated the unlawful use of the mails or that the defendants conspired intending to use the mails. Such a proposition would require proof of a mental state greater than that required for conviction of the substantive mail fraud offense. It is clear, however, that the mental state required for a conspiracy conviction is no greater than that necessary to commit the underlying substantive offense. *United States v. Zarattini*, 552 F.2d 753, 760 (7th Cir. 1977); *United States v. Mauro*, 501 F.2d 45 (2d Cir. 1974).

In its baldest terms, 18 U.S.C. § 371 makes it a crime for two or more persons to conspire to commit any offense against the United States. It is well established that the essence of the crime of conspiracy is an *agreement* to commit such an offense. See, *e.g.*, *United States v. Donner*, 497 F.2d 184 (7th Cir. 1974), *cert. denied*, 419 U.S. 1047; *United States v. Greer*, 467 F.2d 1064 (7th Cir. 1972), *cert. denied*, 410 U.S. 929; *United States v. Fellabaum*, 408 F.2d 220 (7th Cir. 1969), *cert. denied*,

396 U.S. 818; *United States v. Varelli*, 407 F.2d 735 (7th Cir. 1969).

As indicated previously, proof of the offense of mail fraud requires a showing of a scheme to defraud and a mailing which was caused by[35] by a schemer for purposes of executing the scheme. In a mail fraud prosecution, there is no need to prove the intent of the defendant to use the mails. *United States v. Tennenbaum*, 327 F.2d 210 (7th Cir. 1964), *cert. denied*, 377 U.S. 905 (1964). It is sufficient to show that the mailings were in furtherance of the scheme, and were caused by the defendants. Hence, culpability for conspiracy to commit the offense of mail fraud requires only that one *agree* with others to commit the acts which constitute the substantive offense of mail fraud,[36] i.e. one must agree to participate in a scheme to defraud in which the reasonably forseeable use of the mails in furtherance of the scheme is caused by a co-schemer/co-conspirator. We find no basis for the contention that the government must show that the mail fraud conspirators agreed to commit the forbidden acts with knowledge that the conspiracy contemplated the unlawful use of the mails.

By contending that the government was required to prove that the conspirators intended the unlawful use of the mails in furtherance of the scheme to defraud, Peter V. Pappas in effect contends that the government must show that the defendants had specific knowledge of the federal nature of their conspired misdeeds. Use of the mails caused by a defendant in furtherance of a scheme renders the scheme to defraud amenable to federal jurisdiction. *Compare: United States v. Blassingame*, 427 F.2d 329 (2d Cir. 1970); *United States v. Howey*, 427 F.2d 1017 (9th Cir. 1970). The mailings are thus a

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[35] "Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended then he 'causes' the mails to be used. *United States v. Kenofskey*, 243 U.S. 440." *Pereira v. United States, supra*, 347 U.S. at 8-9.

[36] Of course, an overt act to effect the object of the conspiracy is also required. 18 U.S.C. § 371.

jurisdictional element of the offense of mail fraud. A conspirator's knowledge of the federal jurisdictional element of an offense is relevant only to the same extent as it would be if the substantive offense alone were charged. *United States v. Feola*, 420 U.S. 671, 695 (1975). We do not consider a conspirator's knowledge of the federal jurisdictional elements to be an essential, necessary element in a conspiracy to commit mail fraud. *Cf. United States v. Polesti*, 489 F.2d 822, 824 (7th Cir. 1973); *United States v. Thompson*, 476 F.2d 1196, 1198-1200 (7th Cir. 1973); *United States v. Fernandez*, 497 F.2d 730, 738-739 (9th Cir. 1974); *United States v. Iannelli*, 477 F.2d 999, 1002 (3rd Cir. 1973); *United States v. Roselli*, 432 F.2d 879, 891-892 (9th Cir. 1970), *cert. denied*, 401 U.S. 924.

We also find sufficient evidence to support defendants' convictions for conspiracy to commit mail fraud. Walker protests that the only evidence linking him to the conspiracy is Carpentier's statement that there would be "help in his district" and, later, that there would be $500.00 available to Walker in return for his vote and handling the bill. Based on our review of the record, we think the jury could properly infer from the evidence that Walker knowingly agreed to participate in the bribery scheme.

Defendant Craig's contention with respect to the conspiracy count is of a different sort. As with his contentions respecting the mailings, Craig urges that the evidence failed to sustain the charges of the indictment. Specifically, Craig points out that the briber-contractors had one concept of the scheme—payments of $50,000.00 for weight relief legislation on a no law-no pay basis—whereas the bribee-legislators had a different concept of the scheme—payment of the money as the cement bill passed each House, regardless of whether or not it ever became law. After the difference in understanding between the two groups was discovered, Craig argues, the briber-contractors independently conspired to raise the $30,000.00 fund which was used eventually to pay off the legislators. We understand Craig to argue that the evidence showed separate and distinct conspiracies rather than one overall conspiracy. So understood, the argument has no basis in the record.

The indictment charged one overall conspiracy by which the defendants devised a scheme to defraud the citizens of the State of Illinois of their right to loyal, faithful and honest public service. The indictment alleged as part of the conspiracy that the defendant members of the Illinois General Assembly and Peter V. Pappas agreed to accept money for the purpose of changing the weight limit laws, and that these defendants received a portion of the $30,000.00 fund. Our review of the record in this case indicates that the evidence established one general scheme, albeit a complex one. The scheme involved numerous responsibilities on the part of the conspirators to effectuate its purposes. As the statement of facts *supra* indicates, legislators in both Houses of the General Assembly had to be bribed to "handle" the proposed legislation. After the legislators indicated how much their services were worth, the ready-mix functionaries established a plan for raising the bribe fund and embarked upon a course designed to effectuate that plan. To assure the legislators that the fund was readily available, the cash was placed in a safe deposit box. After the bill passed the General Assembly, the legislator-conspirators pressed for their money. Subsequently, the money was paid.

After the Governor's veto of the cement bill, the misunderstanding as to payment between the two groups of conspirators became apparent. Discussions then ensued as to a possible override of the veto. Future weight relief legislation was also discussed. It is clear from the record that the raising of the $30,000.00 did not serve to create a separate and distinct conspiracy, but rather constituted an effort by the industry and members of the conspiracy to patch up the differences in understanding as to the distribution of the bribe fund between the two groups.

Furthermore, the jury was instructed that although the indictment charged a single conspiracy, it would be possible to find more than one conspiracy.[37] The jury

[37] The district court instructed the jury as follows:

"Although the indictment charges a single conspiracy, it would be possible to find separate conspiracies, one

(Footnote continued on following page)

found only one conspiracy as charged. We find no basis in the record for disturbing that finding. The evidence demonstrated one overall scheme in which the conspirators knowingly associated themselves, participated and sought to make it succeed.

This case is thus significantly different from *Kotteakos v. United States*, 328 U.S. 750 (1946) and *United States v. Varelli*, 407 F.2d 735 (7th Cir. 1969), both of which are relied upon by Craig. In *Kotteakos*, the government conceded the existence of several conspiracies, characterizing the conspiracies as "separate spokes meeting in a common center." The Court noted that the proof "admittedly made out a case, not of a single conspiracy but, of several, notwithstanding only one was charged in the indictment" and added that the rim of the wheel to enclose the spokes was not made out. *Kotteakos v. United States, supra*, 328 U.S. at 755.

In *Varelli*, this Court found on the record insufficient evidence to sustain the charge of one overall conspiracy. The panel noted that the evidence demonstrated two separate conspiracies, each of which had a single purpose. As recognized and reiterated in *United States v. Bastone, supra*, 526 F.2d at 979-980, *Varelli* sets forth the test to distinguish between a single conspiracy and multiple conspiracies:

> "While the parties to the agreement must know of each other's existence, they need not know each other's identity nor need there be direct contact. The agreement may continue for a long period of time and include the performance of many transactions. New parties may join the agreement at any time while others may terminate their relationship. The parties are not always identical, but this does not mean that there are separate conspiracies.

[37] *continued*
relating to an alleged sum of $50,000.00 raised to secure passage of H.B. 4176 and the other relating to an alleged sum of $30,000.00 raised to be distributed to legislators after H.B. 4176 was vetoed by the Governor. Whether there was one conspiracy, or two conspiracies, or no conspiracy at all is a fact for you to determine in accordance with these instructions."

> The distinction must be made between separate conspiracies, where certain parties are common to all and one overall continuing conspiracy with various parties joining in terminating their relationship at different times. Various people knowingly joining together in furtherance of a common design or purpose constitute a single conspiracy. While the conspiracy may have a small group of co-conspirators, other parties who knowingly participate with these co-conspirators and others to achieve a common goal may be members of an overall conspiracy.
>
> In essence, the question is what is the nature of the agreement. If there is one overall agreement among the various parties to perform different functions in order to carry out the objectives of the conspiracy, the agreement among all the parties constitutes a single conspiracy" (407 F.2d at 742) (citations omitted).

The evidence here demonstrates one overall agreement among the diverse parties to perform different functions in order to carry out the conspiracy's objective.

V. Travel Act Issues

Counts Thirteen and Fourteen of the indictment charged the conspirators with causing Lauwereins to travel to and from Indianapolis, Indiana with intent to further the scheme to defraud. Lauwereins' travel was charged as a violation of the Travel Act, 18 U.S.C. § 1952.[38] The evidence adduced at trial demonstrated

[38] 18 U.S.C. § 1952 provides in pertinent part:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to (1) distribute the proceeds of any unlawful activities; or (2) commit any crime of violence to further any unlawful activities; or (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter

(Footnote continued on following page)

that on February 29, 1972, Lauwereins traveled from Chicago to Indianapolis to attend a meeting of ID-MRCA in order to solicit that Association's financial support in collecting the $50,000.00 bribe fund. While in Indianapolis, Lauwereins discussed the bribe fund with Chalden, Herb Craig, and other ID-MRCA members. Lauwereins returned to Chicago on the next day and continued his efforts to raise the money.

Craig contends that since he rested at the close of the government's case, and since Lauwereins was called by a co-defendant as a defense witness, who, on cross examination, testified as to his travels to Indiana to raise the bribe fund, Lauwereins' testimony may not be used against him. We reject this contention because government witness Wisner testified that he travelled with Lauwereins across state lines, and government witnesses Chalden and Herb Craig testified that Lauwereins discussed the $50,000.00 bribe fund with ID-MRCA. Other witnesses testified concerning Lauwereins' fund raising activity upon his return to Chicago.

Peter V. Pappas contends that the evidence was insufficient to show that he knowingly and willfully caused an unlawful interstate activity.[39] Specifically, Peter V. Pappas argues that the travel charged in Counts Thirteen and Fourteen was Lauwereins' own doing for his own purposes and constitutes at most a "happenstance" use of interstate travel.

The use of an interstate facility or, as in this case, interstate travel, to facilitate the carrying on of unlawful activity provides a federal jurisdictional basis for crimes

[38] *continued*
performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3) shall be fined not more than $10,000.00 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means . . . (2) extortion, bribery, or arson in violation of the laws of the state in which committed or of the United States.

[39] Craig similarly contends that Lauwereins' trip "could not reasonably have been anticipated."

which would otherwise be of purely local concern. *United States v. Peskin*, 527 F.2d 71, 78 (7th Cir. 1975), *cert. denied*, 429 U.S. 818 (1977); *United States v. Bursten*, ... F.2d ..... (7th Cir. 1977) (slip opinion, August 12, 1977). It is not necessary that a defendant reasonably foresee interstate travel for criminal liability to attach under 18 U.S.C. § 1952. *Rewis v. United States*, 401 U.S. 808, 813 (1971). Nor is it necessary that a defendant knowingly cause interstate travel or the use of an interstate facility. *United States v. Peskin, supra*, 527 F.2d at 78; *United States v. LeFaivre*, 507 F.2d 1288, 1297 (4th Cir. 1974), *cert. denied*, 420 U.S. 1004 (1975). It is sufficient to show interstate travel or the use of an interstate facility with intent to promote or carry on an unlawful activity, and facts constituting the promotion or carrying on of the unlawful activity. 18 U.S.C. § 1952. Of course, where as here, a conspiracy is shown, conspirators are responsible for the acts of their co-conspirators in furtherance of the unlawful activity. *United States v. Peskin, supra*, 527 F.2d at 75; *United States v. Joyce, supra*, 499 F.2d at 16. The interstate travel under § 1952 and the subsequent acts, however, must be more "significant" than merely "incidental" or "minimal". *Cf. United States v. Altobella*, 442 F.2d 310, 315 (7th Cir. 1971); *United States v. McCormick*, 442 F.2d 316, 318 (7th Cir. 1971); *United States v. Isaacs, supra*, 493 F.2d at 1146.[40]

As noted previously, the evidence showed that the raising of the $50,000.00 bribe fund was an essential part of the conspiracy. The record further shows that the ready-mix industry association in Chicago (NIRMMA) considered it important to include the downstate ready-mix industry association in its effort to gain the weight relief legislation. It is also clear that Lauwereins traveled to Indianapolis intending to seek ID-MRCA's financial assistance in raising the necessary funds, and then returned to Chicago to continue his

[40] *Altobella*, *McCormick*, and *Isaacs* involved the "facility in interstate or foreign commerce" aspects of § 1952. We see no reason why the "travel in interstate or foreign commerce" aspect of that statute should be treated differently.

fund-raising efforts. Craig and Peter V. Pappas were both early participants in the scheme and were instrumental in setting the $50,000.00 figure. As co-conspirators in the scheme, they are properly accountable under § 1952 for Lauwereins' interstate travel to promote the bribe fund's collection effort. Because the collection of the $50,000.00 bribe fund was an essential part of the bribery scheme, and because Lauwereins travelled to and from Indianapolis to facilitate the collection of that fund—acts for which Peter V. Pappas and Craig are accountable as co-conspirators—Lauwereins' interstate travel cannot be considered "minimal," "incidental," or "fortuitous." Hence, we conclude on the basis of the record before us that Lauwereins travelled in interstate commerce with intent to facilitate the promotion of the bribery scheme and thereafter engaged in acts constituting the promotion of that scheme within the statutory prohibition of 18 U.S.C. § 1952.

VI. Issues As To The Indictment

Craig contends that the indictment in the instant case should have been dismissed and judgment arrested because the indictment, based on federal criminal statutes of general applicability, violated the Speech or Debate provisions of the Federal and Illinois Constitutions. If by this contention Craig means that federal inquiry into a state legislator's criminal activity is barred by the Speech or Debate Clause of the Federal and Illinois Constitutions, such a contention cannot stand in light of *United States v. Craig*, 537 F.2d 957 (7th Cir. 1976) (*Craig II*). Any privilege assertable by a state legislator against federal inquiry is based on the doctrine of official immunity, a doctrine held by *Craig II* to be inapplicable to criminal acts.

But *Craig II* purported to rule only on evidentiary questions involving the asserted privilege. As Judge Cummings noted in the original panel decision, "only the evidentiary aspect of the Speech or Debate privilege is involved in this appeal." *United States v. Craig*, 528 F.2d

773, 777 (7th Cir. 1976). Judge Tone in his concurring opinion[41] indicated:

> "It is unnecessary to consider the scope of [the Mail Fraud Statute and the Hobbs Act] in order to decide this appeal . . . . [D]etermining whether the doctrine of official immunity shields given legislative conduct is only a preliminary step in resolving the ultimate question of whether Congress intended a statute to apply to that conduct". 528 F.2d at 784.

In reliance on Judge Tone's quoted statement, Craig argues that the federal statutes under which the state legislators were charged cannot serve as a basis for prosecution because the Illinois Constitutional Speech or Debate clause is "valid unless clearly prohibited by the federal Constitution or *specifically* pre-empted by valid federal legislation." (Brief of Defendant Craig, p. 11).[42] In substance, Craig argues that he cannot be indicted for a federal crime because he was a state legislator engaged in legislative activity at the time he allegedly committed the crime. The reason for this sacrosanctity is asserted to be the pre-eminence of the Illinois Speech or Debate Clause over federal criminal law, absent a valid Congressional expression of intent to pre-empt a state's speech or debate provisions.

In its simplest outline, this case involved a trial on a charge of conspiracy to engage in a scheme to defraud in which bribery played a key role. Bribe taking is not protected by the federal speech or debate testimonial privilege, *United States v. Brewster*, 408 U.S. 501, 516 (1972), and when bribe taking is part of a mail fraud scheme involving state legislators, there is likewise no official immunity and no corresponding testimonial privilege. *Craig II*. An indictment charging a state

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[41] Judge Tone's concurring opinion ultimately became the *en banc* decision of this Circuit. *Craig II*.

[42] The Third Circuit has rejected a similar argument in *In Re Grand Jury Proceedings (Cianfrani)*, ... F.2d ....., (Nos. 77-1970/1, 77-2051/2/3, Slip Opinion, pp. 9-10, September 7, 1977).

legislator with conspiracy to commit mail fraud is not insufficient because it names a state legislator as a defendant. We find no authority, and Craig has demonstrated none to us,[43] indicating that Congress, in enacting the mail fraud statute, intended to exempt state legislators from its application. *Craig I* does not so hold.

In support of his contention Craig relies upon *Wheeler v. Barrera*, 417 U.S. 402 (1974). This reliance is clearly misplaced. *Wheeler* involved a federal law providing federal funding for special programs for educationally deprived children in public and private schools. The federal law clearly evinced a specific Congressional intent that the accepting state's constitutional spending proscriptions not be pre-empted as a condition of accepting federal funds. Neither the mail fraud statute nor its legislative history indicates an expression of specific Congressional intent to exempt state legislators from the operation of the mail fraud statute.

Nor can the indictment here be said to strain federal-state relationships. The indictment did not call the state legislators to account for their legislative acts and motives therefor. Nor did the indictment serve to interfere with the legislative processes of the Illinois General Assembly. The indictment merely charged certain individual state legislators with violations of the federal criminal law. Under the circumstances of this case, a prosecution based on such an indictment cannot be said to strain federal-state relations anymore than the speech or debate privilege or official privilege can be said to be intended to make state legislators "super-citizens, immune from criminal responsibility." *United States v. Brewster, supra*, 408 U.S. at 516.

Craig also contends that the district court erred in granting the government's pretrial motion to strike cer-

[43] Craig has cited to us two unpublished district court opinions, *United States v. Gillock*, No. CR 76-104 (W.D. Tenn. 1976) and *United States v. Meyers*, No. 76-163 (W.D. Penn. 1977). But those opinions purport to deal with the evidentiary privilege of a state legislator—a controversy laid to rest by the *en banc* decision of this court in *Craig II*.

tain portions of the indictment. The original panel decision in *Craig I*, holding the existence of a waivable state legislative speech or debate privilege, was rendered prior to trial. To comply with this decision the government successfully moved to strike those portions of the indictment pertaining to legislative acts and motives for those acts. Craig argues that the striking constituted an amendment of the Grand Jury's indictment since it changed the scheme. We do not agree. The motion to strike did not pertain to any portion of the charging paragraph of the counts, and was directed only to those portions of the indictment arguably inconsistent with the then existing state of the law in this Circuit under *Craig I*. The granting of the motion to strike did not change the scheme charged in the indictment, but rather served only to remove offensive portions. Furthermore, the striking did not act to burden the charges contained in the indictment. As such, we conclude that the granting of the motion to strike did not serve to amend the indictment.

Craig further argues that he was denied a fair trial when he based his defense on the testimonial privilege enunciated in *Craig I*. To avoid a possible waiver of that privilege, Craig did not take the witness stand. The *en banc Craig* decision (*Craig II*), rendered after the verdict in the instant case, served to emasculate the defense based upon a state legislator's speech or debate immunity. Craig asserts that had he known prior to trial that it would later be determined that there was nothing he could waive under the *en banc* decision, his defense would have been more aggressive. We fail to see how Craig's defense was prejudiced by an after-trial change in the viability of the legal theory of this defense. Craig's decision to rely on the earlier panel opinion was a strategy decision which we are not inclined to review in the absence of any showing of prejudice.

VII. Other Issues

Following the direct testimony of government witness Carpentier, defendant Walker moved for the production of statements and grand jury testimony of nine Illinois Republican State Senators. Walker asserted that the

"Jencks" material (18 U.S.C. § 3500) pertaining to Carpentier indicated that Carpentier had approached the nine senators seeking their participation in the scheme. These senators were interviewed by postal inspectors during May and June, 1974. Three senators testified before the grand jury in October and November, 1974.

The memoranda of interviews by postal inspectors and the grand jury testimony sought by the motion contradicted much of Carpentier's trial testimony. All nine senators denied any agreement with Carpentier pertaining to the cement bill on the condition of "help in their district." Five of the eight[44] to whom Carpentier claimed to have sent money denied receiving it. Two senators acknowledged receipt of $100.00 in the mail, but denied knowing the source. Walker asserts that the contents of the senators' statements would have aided his cross examination of Carpentier and his decision whether to call declarants as witnesses. Walker claims that the memoranda of interviews and the transcripts of grand jury testimony were relevant exculpatory evidence to which he was entitled under *Brady v. Maryland*, 373 U.S. 83 (1963), and that the proper remedy for the government's suppression of this relevant evidence is a dismissal of the indictment. In the context of the entire record before us (*United States v. Agurs*, 427 U.S. 97 (1976); *United States v. Orzechowski*, 547 F. 2d 978 (7th Cir. 1977); *United States v. Esposito*, 523 F.2d 242 (7th Cir. 1975), *cert. denied*, 425 U.S. 916 (1976)), we do not agree with Walker's contention.

Under *Brady v. Maryland*, *supra*, 373 U.S. 83, 87 (1963) any exculpatory material known to the prosecutor and specifically requested by the defendant must be made available to the defense. But the evidence sought must be material, *United States v. Esposito*, *supra*, and must be unknown to the defense. *United States v. Agurs*, *supra*. While the availability of the pre-trial declarations of the nine senators may have been valuable to Walker in preparation of his cross examination of Carpentier,

[44] Carpentier testified that he did not mail any currency to one senator.

the record indicates that Walker was aware prior to trial of the testimonial evidence which the nine senators were capable of furnishing, and which he claimed at trial was suppressed.

Walker himself testified at trial that during the summer of 1974 he talked to every Republican senator that voted for the cement bill except one or two, and that he never talked to any senator who admitted receiving money. Furthermore, on July 12, 1974, Walker had a conversation with Carpentier in which Walker indicated that some of his senatorial colleagues were denying to the grand jury that they had received money from Carpentier. This conversation was recorded by Carpentier and was admitted into evidence at trial.

The record further shows that Walker and his counsel knew prior to trial the names of the other Republican senators who voted for H.B. 4176, and where to contact them. Nothing prevented Walker's counsel from interviewing the senators as potential witnesses in Walker's behalf. In addition to Walker's awareness of the substance of the nine senators' statements, Walker was offered the opportunity by the district judge to subpoena the senators and to conduct a hearing outside the presence of the jury to ascertain the information he sought. Walker declined the district court's offer.

In light of Walker's pre-trial knowledge of the information which he claimed the government suppressed, and in view of the district court's offer to subpoena the senators and conduct a hearing, we cannot say that the refusal of the government to make available the declarations of the nine senators deprived Walker of due process.

Defendant North contends that the evidence adduced at trial did not prove him guilty beyond a reasonable doubt. Viewing the evidence, as we must, in the light most favorable to the government, we conclude that there was sufficient evidence from which the jury could find that North was a participant in the conspiracy and mail fraud scheme, and was accountable for the acts of his co-conspirators/co-schemers.

The evidence showed that shortly before the November, 1971 meeting of MVLC, Pete Pappas had a conversation with North in Springfield. Pete Pappas testified about their conversation as follows: "I told him that I had something going on the cement bill and it was going to be in the Commission meeting. He said, 'Fine.'"

Pete Pappas further testified that in early or mid-September, 1972, he telephoned North and "I told him of my call from Peter V. and then I told him that if he could make the meeting at the Coffeehouse, I would have something for him. He said he thought he could and I said O.K., fine." At the Coffeehouse meeting Peter V. Pappas delivered an envelope to Pete Pappas in Peter V. Pappas' car, while North was away from the car. Pete Pappas then returned to his own automobile, opened the envelope, removed ten one hundred dollar bills, exited his automobile "and walked to Pat North and gave him the ten one hundred dollar bills and then restarted a conversation about having lunch at the LaSalle Holiday Inn."

After the investigation leading to the indictment in this case began, North told Pete Pappas, in October, 1973, "It would be a good thing if we forget that we ever had that meeting on Interstate 80" (the Coffeehouse meeting). The record also demonstrates that on June 3, 1974, postal inspectors visited and questioned North about the Coffeehouse meeting. North told the inspectors he could not recall the meeting. On the next day North told Pete Pappas of the postal inspectors' visit and that "they knew quite a bit about the meeting on Interstate 80 where the payoff was held."

North argues that the evidence against him "fits very comfortably into a legitimate theory of innocence." (Reply Brief of Defendant North, p. 3). The jury, however, found otherwise. We find no basis on the record before us to disturb that determination.

Both Craig and North contend that their conviction should be reversed because the prosecutors indulged in prejudicial improprieties in their closing and rebuttal arguments. Craig first argues that the government's

labelling him in closing arguments as a distributor-recipient of funds was improper. Our review of the evidence suggests that this label is adequately supported by evidence in the record and constituted a fair characterization of Craig by the prosecutor.

Craig next contends that the prosecutor improperly commented upon his intention to assert his Fifth Amendment privilege against self-incrimination. The transcript of the challenged part of the closing argument reads as follows:

> Now, going back to that tape recorded conversation with Representative Craig and Representative Pappas at the Mansion View Motel in October of 1973, Craig undisputedly admits his involvement in this case.
>
> And, in substance, he tells Representative Pappas three times that he is not going to admit anything if he is asked about money. And, in addition to the statement that I got four and I'm not going to say anything about it, Representative Craig, you recall the tape, also said if they ask me about it, I'm not going to say. I'm not going to say I don't know because I am not going to admit the god damn money now. That is what Representative Craig said on the tape, if you recall the tape.
>
> Now, Craig also stated, in substance, when Representative Pete Pappas mentioned that he was worried about the investigation, that the investigation he stated sure cured him, cured him of taking bribe money in the Illinois General Assembly. Now, after admitting his involvement and after explaining that he was going to deny it to the authorities, after hearing those tape recorded conversations, there can be no question that Robert Craig knowingly and willfully participated in this scheme to accept bribe money and thereby defrauded the citizens of the State of Illinois.

The prosecutor's remarks were based primarily on the tape recorded conversation between Craig and Pete Pappas. Craig's actual statement, as shown by a transcript of that recorded conversation, indicates:

> If they asked me about that I don't know, I'm going to say I don't know. I don't remember anything about any of that money . . . . Cause I ain't going to admit (unintelligible) god damn money now.

Craig argues that he expressed in that conversation an intent to invoke his Fifth Amendment privilege, the exercise of which is generally exempt from comments by the prosecution in post-*Miranda* situations. *United States v. Hale*, 422 U.S. 171 (1975). However, we cannot view, as apparently Craig wishes us to, Craig's statements as an expression of desire to maintain a post-arrest silence. Rather, it is clear that the prosecutor merely commented on a statement from one conspirator to another evincing an attempt to conceal his misdeeds. In view of the entire argument, we cannot consider such comment improper.

North challenges the government's rebuttal closing argument, contending improper and prejudicial remarks in four instances. First, North argues that the government's characterization of his defense as a fabrication constituted prejudicial error depriving him of a fair trial. North, through his counsel, admitted receiving the one thousand dollars from Pete Pappas, but defended through circumstantial evidence the receipt of the money as a campaign contribution. In his rebuttal argument, the prosecutor reviewed for the jury his understanding of the evidence offered by North to support the defense of a campaign contribution, argued that the evidence did not support the defense, and concluded:

> "The facts are that Mr. North didn't treat this as a campaign contribution. It is a fabricated defense that was brought into this courtroom in an effort to get you to acquit Frank P. North."

Characterization of a defense as fabricated, standing alone, is no more improper than characterizing a witness as a liar. *Compare, United States v. Isaacs, supra*, 493 F. 2d 1124, 1166. But where the terms "fabricated" or "lies" are used repeatedly to the point of excessiveness, the line between the "undignified and intemperate" (*Berger v. United States*, 295 U.S. 78, 85

(1935)) and the hard or harsh but fair may be crossed with a resultant impairment of "the calm and detached search for truth to which a criminal trial should aspire." (*United States v. Spain*, 536 F.2d 170, 175 (7th Cir. 1976)). We do not think the characterization of North's defense as a fabrication, in the circumstances of the government's rebuttal, crossed that line and became prejudicially improper.

Similarly, North contends that the prosecutor's characterization of defense witness Mrs. North as a liar was prejudicial error. During the trial, Mrs. North testified in behalf of her husband. On cross examination, she first stated that North did not tell her the one thousand dollars was in cash, and then, a few questions later, stated that North did tell her the money was in cash. With respect to this inconsistency, the prosecutor in rebuttal arguments, stated:

> "She reached the point where she tried a little too hard to help her husband and she got caught in a lie . . . . Mrs. North realized that if she was going to carry the ball forward, that she was going to have to tell a lie, that she got caught in."

North argues, as he did below, that the prosecutor stated to the jury his personal opinion that Mrs. North was a liar, and that this statement was prejudicial. Since there is a factual basis in the record for the prosecutor's comments, and since the record does not show an abusive and indecorous use of the term "liar" we find no prejudice from its use.

North also contends that the prosecutor's erroneous account of two events resulted in prejudicial error. The first instance pertains to the postal inspector's testimony with respect to the meeting at the Coffeehouse. Postal Inspector Greenan testified that he asked North about the meeting, but that North couldn't recall it. During rebuttal, the prosecutor stated that North denied the Coffeehouse meeting.

Without indulging in a discussion of the semantical differences between "inability to recall" and "denial," we feel that the use of "denial" was not an inappropriate

characterization of North's statements to the postal inspector. The record showed that prior to the interview with the postal inspector, North told Pete Pappas, "It would be a good thing if we would forget that we ever had that meeting on Interstate 80." Further, on the day after the interview, North mentioned to Pete Pappas that the postal inspectors "knew quite a bit about the meeting on Interstate 80 . . . ." In view of this evidence, the prosecutor properly drew the inference that North denied the Coffeehouse meeting.

Finally, North claims prejudicial error in the prosecutor's account of a conversation between Pete Pappas and North. Pete Pappas testified that on November 8, 1971, he had a conversation with North. Pete Pappas related: "I told him that I had something going on the cement bill and it was going to be in the Commission meeting." North responded: "Fine".

During rebuttal argument, the prosecutor stated a concededly erroneous version of that conversation: ". . . North was told by Pete Pappas 'there will be something for you on the cement bill,' or 'there is something for you on the bill,' . . . ." North sought to no avail to have the trial judge correct this misstatement.

The prosecutor's remark, adding the "for you" to the "something," was clearly a misstatement of Pete Pappas' testimony. Yet, under the circumstances in which the misstatement was made, we do not find it to have been so prejudicial as to warrant reversal. The jury had heard Pete Pappas' testimony. The prosecutor correctly recited Pappas' testimony with respect to the conversation with North in the opening portion of his closing argument. North's own counsel correctly reiterated the substance of the conversation in his closing argument. Furthermore, immediately after this misstatement, and after a brief recess, the district court admonished the jury:

> "It is the law that lawyers who argue their respective sides of the case have the right to comment on the evidence, interpret it as they see it. However, what they say is not evidence and their comments do not make true what they claim is true. It is for you to decide, from all the evidence you have heard, what are the facts."

The district court repeated a substantially similar admonition in his final charge to the jury. Under these circumstances, we find no prejudicial error in the prosecutor's misstatement.

Craig also contends that the district court erred in allowing the government over objection to call the United States Attorney (Sam Skinner) as a witness. Craig argues that Skinner's testimony enabled the government to enhance or vouch for the veracity of those witnesses who were given immunity. Skinner testified in substance that the grand jury's investigation had become bogged down in May, 1973, and that it became necessary to grant immunity to Material Service Corporation and its employees to further the investigation. The government contends that it offered Skinner's testimony in response to statements made by defense counsel during the *voir dire* examination of the jurors, in opening statements to the jury, and during cross examination of non-immunized witnesses. The result, the government argues, was the creation of the impression in the minds of the jurors that certain persons were free from prosecution for some nefarious and unjustifiable reasons.[45]

While we condemn the unusual practice of calling the United States Attorney to offer testimony explaining the motivation for granting immunity to certain persons involved in a case, we conclude that Skinner's testimony, although irrelevant, did not constitute reversible error under the circumstances of this case.

We note, first, that defense counsel on several occasions insinuated that the granting of immunity was tinged with impropriety. Secondly, the district court

[45] Early in the trial, one juror presented the following written question to the trial judge: "Since we are hearing the trial of eight people, not including Lester Crown, I am concerned with the fact that Mr. Coghlan has placed great importance upon the immunity granted to Mr. Crown. Can we expect the lawyers for the prosecution to tell us why this immunity was given?"

properly instructed the jury as to immunity and how it should be considered. In view of the controversy over the granting of immunity created by defense counsel, and in view of the fact that the jury was properly instructed as to the nature of immunity, we feel that the district court did not err in allowing the government to call the United States Attorney as a witness. In so finding, however, we do not wish to intimate that we condone such practice. Where a witness is immunized, the government can fairly expect vigorous, adverse inquiry and attack on the credibility of immunized witnesses by defense counsel. But where, as here, the early stages of the trial were so imbued with an aura of impropriety over the grants of immunity—an aura created not through cross examination of immunized witnesses, but through argumentative statements during voir dire, opening remarks, and in cross examination of non-immunized witnesses—we cannot say that the district court erred in allowing the government to meet these insinuations of impropriety through the testimony of the United States Attorney.

North also contends that the jury reached a legally and factually inconsistent verdict with respect to him. This argument, however, has been rejected on previous occasions by this court, and we reject it here. *E.g. United States v. Serbins*, 538 F.2d 737, 747 (7th Cir. 1976); *United States v. Greene*, 497 F.2d 1068, 1085-86 (7th Cir. 1974); *United States v. Tankersley*, 492 F. 2d 962 (7th Cir. 1974).

North further claims that his sentence was excessive.[46] We find nothing in the record indicating an abuse of discretion by the district court in sentencing North and, accordingly, reject this claim.

North also claims that the verdict as to him was void because the district court clerk's misreading[47] of the ver-

[46] The district court sentenced North to four concurrent three-year terms of imprisonment on each of the four counts for which North was convicted. North was also fined $5000.00 on the conspiracy count.

[47] When the district court clerk read the verdict form he left the impression that North was found guilty only as to Count One, the conspiracy charge. In fact, the jury had found North guilty on Counts Ten, Eleven, and Twelve in addition to Count One.

dict form followed by a polling[48] of the jury revealed the jury's confusion as to the North verdict which should have been resolved prior to the discharge of the jury.

Whatever the effect of the clerk's misreading we have no occasion to consider, for it is clear that the verdict was correctly published as to the conspiracy count. Since the sentences imposed on North were to run concurrently, reversal on the claimed error would result in no practical difference. *Cf. United States v. Holtzman*, 440 F.2d 923, 927 (7th Cir. 1971). Accordingly, we deem it unnecessary to consider North's claim.

North further contends that reversal of his conviction is required because the prosecutor's cross examination of his wife, Shirley North, was prejudicial. We have reviewed the transcript with respect to this contention and find no error warranting reversal.

Prior to trial, North moved the district court for an order dismissing the indictment and/or suppressing all evidence obtained or derived as a result of a plea agreement between the government and Pete Pappas.[49] North contends first that the proceedings before Judge Morgan violated the doctrine of separation of powers, thus depriving him of an independent judiciary and, secondly, that the plea proceedings were an improper use of the judiciary to convert Pete Pappas into a government witness.

We find nothing in the record of the proceedings[50] before Judge Morgan indicating that the plea agreement and subsequent acceptance by Judge Morgan were improper or illegal. The agreement contemplated that Pete Pappas, a resident of Rock Island, Illinois, was to be

[48] Individual jurors were polled as to their entire verdict regarding all eight defendants, not as to each verdict.

[49] The factual basis for North's contention with respect to Pete Pappas' plea negotiations is set forth *supra*, in the text surrounding note 16 in Pt. II.

[50] The transcripts of proceedings before Judge Morgan were filed in the District Court in this case and are part of the record on appeal.

charged with a criminal tax violation in the Southern District of Illinois, where Judge Morgan presides. While the details of the agreement were disclosed to Judge Morgan, who viewed them approvingly, Judge Morgan did not participate in any of the negotiations resulting in the agreement. The proceedings were recorded, and copies of the transcripts were made available to the defendant. The district court properly denied the motion to suppress and/or dismiss the indictment.

At trial, under the provisions of 18 U.S.C. § 3500(c), the government tendered the prior statement of witness Pete Pappas to the district court for an *in camera* inspection to determine the relationship of those statements to Pappas' direct testimony. Judge Leighton reviewed the statements and ruled that the statements did "not pertain to the subject matter of this case." Pappas' statements have been transmitted to this Court, and North has requested us to review the district court's ruling. We have complied with this request, and find no error in the district court's ruling.

The judgments of conviction are affirmed.

AFFIRMED.

SWYGERT, *Circuit Judge*, dissenting. This case follows a pernicious trend that has been developing in our federal criminal jurisprudence over a long period of time: the extension of federal jurisdiction beyond anything intended by Congress when it enacted the various provisions of the Criminal Code. (Only the Supreme Court seems to have recently called a halt, *e.g.*, *United States v. Maze*, 414 U.S. 395 (1974); *Rewis v. United States*, 401 U.S. 808 (1971).) The trend I speak about is not confined to the mail fraud statute and the federal travel act,[1] but in this dissent I shall confine my attack on the overextension of federal juridiction to these two statutes because they are the ones involved in this case.

I wish to make one thing clear at the outset. The scheme to defraud in this case was of large magnitude. It was also pervasive, involving members of both houses of the Illinois legislature and of both major political parties. The defendants and their unindicted co-schemers perpetrated a corrupt fraud upon the citizens of Illinois. Vigorous prosecution was called for. But as large and perverse as the scheme was, it did not constitute violation of either the federal mail fraud or travel act statutes.

I

In *United States v. Joyce*, 499 F.2d 9, 23 (7th Cir. 1974), I voiced the view that the Government had stretched the mail fraud statute to the breaking point by using mailings which were at best only tangentially related to the fraudulent scheme. I reluctantly concurred in an affirmance in that case. Here the mailings used to sustain the convictions have gone beyond the breaking point. To affirm is to extend impermissibly the scope of federal criminal jurisdiction.

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[1] This trend is also visible in prosecutions under the Hobbs Act, *United States v. Amabile*, 395 F.2d 47, 54 (7th Cir. 1968) (Swygert, J., dissenting); *United States v. Battaglia*, 394 F.2d 304, 318 (7th Cir. 1968) (Swygert, J., dissenting); and conspiracy, *United States v. Hoffa*, 367 F.2d 698, 716 (7th Cir. 1966) (Swygert, J., dissenting).

A

As illustrated by the majority's opinion, federal courts have increasingly given the mail fraud statute[2] a very expansive interpretation. But in their zeal to convict the guilty, these courts have blurred a very important distinction between the two elements of the offense of mail fraud. I concur in the view that the first element—the scheme to defraud—should be liberally and broadly interpreted so as to cover the many unforeseen and diverse kinds of fraud which may be devised. I am equally convinced, however, that the second element—use of the mails—ought to be interpreted strictly and narrowly. This strict interpretation is necessary not only because the mailings provide the basis of federal jurisdiction, but also because such an interpretation comports with the limited scope of the statute.

The purpose of the mail fraud statute, first enacted in 1872,[3] was limited to protecting the postal service rather than providing a weapon against every fraud perpetrated in the states. Although the legislative history of the statute is sparse, it is important to note that the provision was placed within the chapter entitled, "An Act to Revise, Consolidate, and Amend the Statutes Relating to the Post-Office Department." That Congress was concerned with the misuse of the postal service, as distinguished from the prevention of schemes to defraud as such, is shown by its insertion of the following language in the original enactment:

> [T]he court . . . shall proportion the punishment especially to the degree in which the abuse of the post office establishment enters as an instrument into such fraudulent scheme and device.

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[2] 18 U.S.C. § 1341.

[3] Act of June 8, 1872, ch. 335 § 301, 17 Stat. 323. Although the statute has been amended on several occasions, these amendments have made only insignificant changes in wording; the provision has always prohibited schemes to defraud involving use of the mails "for executing such scheme[s]." *See* Note, *Survey of the Law of Mail Fraud*, 1975 U. Ill. L.F. 237, 239.

The first judicial decisions interpreting the statute confirmed the limited congressional purpose. In *United States v. Jones*, 10 Fed. 469, 470 (S.D.N.Y. 1882), the court noted, "[T]he gist of the offense consists in the abuse of the mails." In *United States v. Loring*, 91 Fed. 881, 883, 887 (N.D. Ill. 1884), the court was more specific:

> [T]he right to punish a person who uses the mails for purposes of fraud . . . is the scope and intent of [the mail fraud statute].
>
> * * * * *
>
> The object of the law was to prevent persons having fraudulent designs on others from using the post office as a means of effectuating such fraud.

This court has adopted a like interpretation. In *United States v. Browne*, 225 F.2d 751, 757 (7th Cir. 1955), Chief Judge Major declared:

> In any event, it is not the scheme to defraud which the federal statute condemns but only the use of the mails in its execution. It is that use which constitutes the *corpus delicti* of the offense.

See United States v. Aldridge, 484 F.2d 655, 660 (7th Cir. 1973); *United States v. Lowe*, 115 F.2d 596, 598 (7th Cir. 1940), *cert. denied*, 311 U.S. 717 (1941); *United States v. Minnec*, 104 F.2d 575, 577 (7th Cir.), *cert. denied*, 308 U.S. 577 (1939); *Worthington v. United States*, 64 F.2d 936, 938 (7th Cir. 1933). Other circuits have adopted a similar interpretation.[4]

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[4] In *Cochran v. United States*, 41 F.2d 193, 197 (8th Cir. 1930), the Eighth Circuit declared:

> The use of the post office establishment in the execution of the alleged scheme to obtain money by false pretenses is the gist of the offense which the statute denounces, and not the scheme to defraud.

See also United States v. Anderson, 466 F.2d 1360 (8th Cir. 1972); *United States v. Lynn*, 461 F.2d 759, 762 (10th Cir. 1972); *Milam v. United States*, 322 F.2d 104 (5th Cir. 1963), *cert. denied*, 377 U.S. 911 (1964); *Rosenberg v. United States*, 120 F.2d 935, 937 (10th Cir. 1941).

That the essence of the federal offense is the abuse of the postal service and not the scheme to defraud is further shown by the fact that counts are related to the number of mailings involved, not the number of schemes. *United States v. Aldridge*, 484 F.2d 655, 660 (7th Cir. 1973); *United States v. Browne*, 225 F.2d 751, 757 (7th Cir. 1955). This is because the offense against the United States is the misuse of the mails and the injury is sustained as soon as the mailing occurs. *Badders v. United States*, 240 U.S. 391, 394 (1916); *In re Henry*, 124 U.S. 372, 374 (1887). *Cf. Ebeling v. Morgan*, 237 U.S. 625 (1915). The point is obvious. If prevention of schemes to defraud were the primary purpose of the mail fraud statute, then the converse would be true: a defendant could be convicted only on the number of schemes he had devised, not on the number of mailings.[5]

But the statute is even more restrictive than just proscribing the use of the mails. It requires that the mailings be "for the purpose of executing such scheme." Though the mailings do not have to be fraudulent in themselves they, nonetheless, must be "sufficiently closely related to [the defendant's] scheme to bring this conduct within the statute." *United States v. Maze*, 414 U.S. 395, 399 (1974). The statute requires, therefore, a close and substantial nexus between the mailings and the fulfillment of the scheme.[6] A number of formulations make

[5] Similarly, this court has held that neither the ultimate success of a fraudulent scheme nor the actual defrauding of a victim is crucial to a successful prosecution. *United States v. Keane*, 522 F.2d 534, 545 (7th Cir. 1975), *cert. denied*, 424 U.S. 976 (1976). Again, this can be true only because the federal offense is the misuse of the mails and therefore the injury is complete when the defendant uses the mails.

[6] In *Maze*, the Supreme Court reviewed its prior mail fraud decisions and explained the differing results on the degree of connection between the mailings and the execution of the scheme. For example, in *Pereira v. United States*, 347 U.S. 1 (1954), the conviction was affirmed because the mailing "played a significant part in enabling the defendant in that case to acquire dominion over the $35,000." 414 U.S. at 401. In contrast, the convictions in *Parr v. United States*, 363 U.S.

(Footnote continued on following page)

the point: "[U]sing the mails as a means of effectuating such fraud," *United States v. Loring*, 91 Fed. 881, 887 (1884); "[T]o prevent the post office from being used to carry [the fraud] into effect," *Durland v. United States*, 161 U.S. 306, 314 (1896); The mails must be used "as a central, necessary instrumentality in [the scheme's] perpetration," and play "an indispensible role," *United States v. Maze*, 414 U.S. at 408-09 (White, J., dissenting); The mails must be "a step toward receipt of the fruits of the scheme," *United States v. Staszcuk*, 502 F.2d 875, 880 (7th Cir. 1974), *cert. denied*, 423 U.S. 837 (1975). In sum, a causal relation must exist between the mailing and the execution of the scheme.

The majority acknowledges that the mailings must be "in furtherance of" the scheme, but then fails to demonstrate how the mailings listed in the indictment actually fulfilled that requirement. Instead it uses an incorrect test: the mailings were "incidental to an essential part of the scheme." This test, standing alone, is wholly insufficient. It leaves out the necessary causal relation. Any mailing can be incidental to the scheme; yet it may not further its execution. The flaw in the majority's test is that the "essentiality" element is misplaced. The mailing must be essential to the execution or furtherance of the scheme. It matters not whether it relates to an essential element of the scheme because all the essential elements of a fraudulent scheme must exist *a priori* before a determination of the sufficiency of the mailings can be made. To use the majority's terminology, the mailing must be an essential incidence of the *furtherance* of the scheme, that is, of putting it into effect (not incidental to an essential element of the scheme).

[6] *continued*
370 (1960) and *Kann v. United States*, 323 U.S. 88 (1944), were reversed because the mailings were "immaterial" to the consummation of the schemes. 414 U.S. at 400, 401. The defendant's conviction was also reversed in *Maze* because the success of the scheme did not depend in any way on the mailings. *Id.* at 402.

Congress could have drafted a much broader statute than it did.[7] But it did not do so. Rather, Congress intended only to combat a certain, limited type of fraud.

> The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law. *Kann v. United States*, 323 U.S. 88, 95 (1944).

Because the mail fraud statute reaches only a use of the mails which is essential to the execution of the scheme, a careful diagnosis of each mailing is necessary. Upon that diagnosis depends the jurisdiction of a federal court to convict one who has devised a scheme to defraud. The temptation to adopt a cavalier attitude once a fraudulent scheme is shown to have existed must be resisted. The trend to extend federal jurisdiction haphazardly so as to convict the guilty at all costs must be stopped. States have the ability and resources to prosecute those who perpetrate fraudulent schemes against their own citizens.

Against this backdrop, I now turn to an analysis of the individual mailings.

B

To reiterate, the mail fraud statute requires that there be a scheme to defraud and a mailing. *Pereira v. United States*, 347 U.S. 1, 8-9 (1954). But to support federal jurisdiction, the mailing element further requires that: (a) the defendant "cause" the use of the mails, and (b) he use the mails "for the purpose of executing" the scheme.

[7] Congress could have drafted the mail fraud statute so as to require only that the mails in fact be used. *United States v. Maze*, 414 U.S. 395, 405 (1974). *See also Badders v. United States*, 240 U.S. 391, 393 (1916). Or, using the commerce clause, Congress simply could have prohibited fraud as a class of activities affecting interstate commerce without any use of the mails. *Cf. Perez v. United States*, 402 U.S. 146, 150 (1971).

United States v. Maze, 414 U.S. 395, 399 (1974). One causes the mails to be used when he "does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended . . . ." *Pereira, supra.* To meet the second requirement, the mailings must "further," "aid" or be a "step toward" the fulfillment of the scheme. The mailings in the present case cannot be said to further the scheme, or in some instances, be said to be caused or foreseen by the defendants.

(1) *Counts Two through Five: MVLC Notices*

The mailings which formed the basis for the convictions on Counts Two, Three, Four, and Five were notices and agenda of the December 1971 and January 1972 meetings of the Motor Vehicle Laws Commission (MVLC) which were mailed to ready-mix industry representatives Connolly and McBride, two unindicted coschemers. Because the purpose of the scheme was the enactment of a new weight law for cement trucks, it cannot be doubted, as the majority observes, that submission of the proposed legislation in the MVLC was an important step in the scheme. Nor is there any question that Connolly and McBride caused the mailings.[8] It cannot be said, however, that these mailings furthered the scheme.

It was entirely immaterial whether McBride and Connolly received written notices of future MVLC meetings. As they were present at the committee meetings,[9] they could hear the announcement when the committee met next. Moreover, the MVLC met on a

[8] The parties dispute whether the MVLC is required by law to send these notices or does so merely as a courtesy to interested persons. Resolution of the issue is irrelevant in light of *United States v. Staszcuk*, 502 F.2d 875, 880 n.11 (7th Cir. 1974), *cert. denied*, 423 U.S. 837 (1975).

[9] Also present at the MVLC meetings were defendants Peter V. Pappas, Craig, Wille, and Chalden, and coschemer Lauwereins.

regular basis[10] and a key Government witness testified that these notices are "not necessarily" received before the next meeting. Because there was no need for any notice, no reliance upon the receipt of the notice through the mails, and no reliance upon the notice itself, these mailings were not in furtherance of the scheme and were not sufficiently related to it to bring them within the statute. These mailings cannot be considered "a step toward receipt of the fruits of the scheme." *United States v. Staszcuk*, 502 F.2d at 880.

The majority's effort to distinguish *Parr v. United States*, 363 U.S. 370 (1960), is a combination of illogic and irrelevancy.[11] One has only to look at the notices themselves to see how remote they are from the scheme, or perhaps better to say, how utterly innocuous they were. *See* Appendix A and B.

(2) *Counts Six and Seven: Waiver of NIRMMA Dues*

Counts Six and Seven are duplicate letters sent to the members of the Northern Illinois Ready-Mix and Materials Association (NIRMMA). The letters simply informed the members of the association that dues would be suspended for three months because of the large reserves accumulated in NIRMMA's treasury. *See* Appendix C.

During the NIRMMA annual convention in Miami Beach in February 1971, several members of the association, including Connolly, met to discuss the raising of the $50,000 demanded as a bribe for the

[10] MVLC met on the second Monday and, if necessary, the second Tuesday of every month.

[11] *Staszcuk* also is not inapposite as the majority contends. As in *Staszcuk*, "[t]he purpose of the notices was to provide an opportunity for affected persons to state objections to the proposed [legislative] changes." 502 F.2d at 880. As in *Staszcuk*, parties did come as a result of the notices to state their objections to the bill (here, the State Police and the Department of Transportation). Therefore, as in *Staszcuk*, the purpose of the mailings conflicted with rather than promoted defendants' scheme to defraud.

passage of the so-called "cement bill." Connolly suggested that the dues of the association members be suspended for a period of time to compensate partially those members contributing to the fund. On March 9, NIRMMA's board of directors moved to suspend the dues payments of members for three months to reduce the reserve monies of the association and to compensate in part the members contributing to the fund.

Given this background, it must be noted that the $50,000 fund was not derived from funds of any of the NIRMMA companies.[12] The waiver of the dues, however, benefitted the companies, not the individuals who provided the funds. Moreover, the waiver extended to all members of the association whether or not their officers had contributed to the fund. Finally, the dues suspension was not rescinded with the return of the $50,000 fund to its contributors.

The majority says: "It is clear from the record that the collection of the $50,000 bribery fund was an essential part of the scheme and that the mailings were done as incidental aspects of the task of assembling the fund." This facile pronouncement does not meet the issue. The letters forming the basis of Counts Six and Seven may have been "incidental" to the raising of the bribe fund, but they do not meet the *Staszcuk* test. How can it possibly be maintained that the suspension-of-dues letters in any way furthered the scheme? If anything, they were merely bookkeeping devices to offset the internal accounts of the association members. Even this is a loose description. Certainly they were not an integral part of the execution of the scheme which was well under way when the letters were written. If the Government had produced letters mailed to solicit the $50,000 fund, it would be on more solid ground. But when it uses internal communications between the association members that are only incidental to and not

[12] For example, Wiggington supplied $1600 from fees collected for the use of a company's scale, Arcquilla supplied $1020 from personal funds, Moeller contributed $8200 from personal funds, and Lester Crown supplied $8000 from his personal safe.

in furtherance of the scheme, it reaches for a straw. If mail fraud cases are to be built on such flimsy foundations, then the distinction between mere incidental use of the mails and the use of the postal facilities to further the execution of the scheme to defraud disappears.

(3) *Counts Eight and Nine: Fraudulent Expense Vouchers*

When the $40 per truck assessment of the NIRMMA members proved to be insufficient to raise the $50,000 bribe fund, the $3160 deficit was made up by co-schemers Wille and Moeller. To reimburse them for this outlay, false expense vouchers were submitted by Bernard Arcquilla and Morris Lauwereins to Connolly of NIRMMA. The cash generated by these vouchers was turned over to Connolly who in turn reimbursed Wille and Moeller. The mailings of these two expense vouchers form the basis of Counts Eight and Nine. *See* Appendix D and E.

It can readily be seen that this operation was a side swindle to defraud NIRMMA concocted by industry schemers Connolly, Wille, Moeller, Arcquilla, and Lauwereins. The mailings of the vouchers may well have been in furtherance of this separate scheme (to benefit themselves at the expense of NIRMMA), but they were only incidental and peripheral to the scheme to defraud the public by using bribery to pass the cement bill. The vouchers, much less their mailing, were not essential to the success of the scheme and were not an integral part of its execution. The following diagram brings home the point.

Peter V. Pappas



The diagram illustrates my difficulty in understanding how the appellants here, the legislative schemers, can be said to have caused the mailings of these two false expense vouchers. How can it be said that the legislative schemers could have reasonably foreseen that an entirely different fraud would be perpetrated against NIRMMA? How can it be said that they could have reasonably foreseen that the industry schemers would use and mail false vouchers to assemble a small part (6%) of the fund? I am fully aware that the law of conspiracy holds each member responsible for the use of the mails caused by other members. But to blindly apply this principle to a case such as this is to exhalt fiction over reality. I believe that the Counts Eight and Nine mailings fall within the ambit of *Pereira v. United States*, 347 U.S. 1 (1954), as too remote and unforeseeable.

(4) *Counts Ten and Eleven: Trade Association Bulletins*

The mailings which were the subject of Counts Ten and Eleven consisted of bulletins mailed by two ready-mix industry associations, Northern Illinois Ready-Mix and Materials Association (NIRMMA) and Illinois Division-Midwest Ready-Mix Concrete Association (ID-MRCA), informing their members of Senate passage of H.B. 4176 and urging them to contact the Governor to sign the bill.[13] *See* Appendices F and G. Whether these otherwise innocuous trade bulletins can be said to be "in furtherance of the scheme" depends on how the scope of the scheme is defined.

As the majority notes, the ultimate goal of the ready-mix industry was the enactment of a new weight law for cement trucks. There was nothing improper or illegal in seeking such an objective; indeed, one of the major purposes of trade associations is to obtain favorable legislation. This activity includes lobbying efforts such as urging members to contact the Governor.

[13] The ID-MRCA bulletin also urged its members to write the Governor concerning H.B. 4177, legislation not subject to the bribery scheme. *See* Appendix F.

What was corrupt about the instant conduct was the giving to and receipt of bribes to the legislators.[14] This was the fraud perpetrated upon the citizens of Illinois, not the passage of a new weight law.[15] These considerations lead to the inescapable conclusion that these mailings were not an integral part of the execution of the scheme to defraud and were not in furtherance of its execution. Under the *Maze* test, they were not sufficiently related to the scheme to come within the mail fraud statute.

(5) *Count Twelve: Mailing of $500 in Cash to Walker*

H.B. 4176 was passed by the Illinois House of Representatives on May 12, 1972. It was introduced in the Illinois Senate three days later. Shortly thereafter Carpentier spoke with ten Illinois Republican senators. One was Jack E. Walker. Carpentier asked Walker to support the cement bill, saying ambiguously "that there would be help in his district." In mid-June 1972 while the bill was pending in the Senate, Carpentier told Walker that Senator Harris could no longer sponsor the bill because Harris was ill. Carpentier then told Walker that if Walker would handle the bill, "an additional $500 would be given him." Walker agreed to handle the bill.

Carpentier testified that in September 1972 he received $5000 in $100 bills from Pappas. He said that a few days later he had his wife type the addresses of nine senators on plain envelopes. He further testified that using the cash supplied by Pappas, he placed a $100 bill in each of eight envelopes and five $100 bills in an envelope addressed to Walker and that he then mailed these envelopes. Walker testified at the trial and denied that

[14] That the illegal scheme was limited to passage of the law in the two houses is supported by the fact that the bribes were paid, though in lesser amounts, *after* the Governor vetoed the bill.

[15] This conclusion is supported by the fact that the Government neither alleged nor proved that the object of the conspiracy was to influence unlawfully the Governor or his staff.

he was offered money or that he received any money in connection with the bill.

At trial the Government introduced an envelope mock-up,[16] *see* Appendix H, apparently realizing that its proof of mailing was on extremely shaky grounds: the assertion by Carpentier that he had mailed $500 in cash in a plain envelope to Walker juxtaposed against Walker's denial that he had been promised or had received any money. There being no corroborating evidence, the proof of the use of the mails to further this vast scheme, convicting numerous defendants on this count, boils down to one man's word against another's.

Despite the fact that the proof rested on quicksand, the majority says with seeming assurance: "It was shown at trial that Carpentier placed $500.00 in an envelope and mailed it to Walker in fulfillment of their prior agreement that Walker would receive $500.00 for handling the cement bill in the Senate. We have no difficulty in concluding that this distribution of the proceeds of the bribe fund was in furtherance of the scheme." It is true that the distribution of part of the bribe to Walker, if it occurred, was a furtherance of the scheme, but that does not make its delivery, as asserted by Carpentier, through the postal service, a use of the mails as contemplated by the statute. It was a fortuitous, unforeseen circumstance. In other words, it was a sport in the totality of the scheme—not an integral part of its execution or an essential incident to its success. To hold that these convictions on charges for using the mails to defraud should depend on this weak thread, is to say that the most attenuated use of the post office is sufficient under the statute.

II

The flaw in the majority's diagnosis of the convictions on the two travel act counts[17] is similar to that of the

[16] Interestingly, the envelope mock-up is addressed to 18018 Arcadia Avenue. Count Twelve of the indictment charges a mailing to 18225 Burnham Avenue.

[17] Count Thirteen charged the defendants with Lauwereins' trip to Indianapolis on February 29, 1972, and Count Fourteen charged them with his return trip to Chicago the next day.

mail fraud counts. My colleagues, ignoring the limited congressional purpose of the act, stretch the statute beyond recognition and extend unduly federal jurisdiction to prosecute what was essentially a state crime.

The congressional purpose of the travel act was to attack criminal activities extending beyond the borders of one state by providing federal assistance in situations in which local law enforcement was ineffective. *United States v. Nardello*, 393 U.S. 286, 290-92 (1969). *See also Erlenbaugh v. United States*, 409 U.S. 239, 245-46 (1972). The statute was aimed primarily at organized crime and, in particular, at persons who reside in one state while operating or managing activities located in another. *Rewis v. United States*, 401 U.S. 808, 811 (1971). I concur with the view that the scope of the statute is not limited to the original congressional purpose, *i.e.*, organized criminal activity operating interstate. *See United States v. Peskin*, 527 F.2d 71, 76-77 (7th Cir. 1975), *cert. denied*, ... U.S. ..... (1976). As with the mail fraud statute, the alleged criminal activity should be viewed broadly. But, as with the mail fraud statute, Congress did not intend a broad-ranging interpretation of section 1952. The interstate travel aspects should be scrutinized narrowly. Otherwise, federal jurisdiction is extended to situations never intended by Congress. *Rewis*, *supra* at 812.

The test for application of section 1952 is the nature and degree of interstate activity in furtherance of the state crime. *United States v. Isaacs*, 493 F.2d 1124, 1148 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974). As the majority concedes, that degree of interstate travel or activity must be more than minimal or incidental; the statute was intended to reach only significant interstate activity. *Isaacs*, *supra* at 1146; *United States v. Altobella*, 442 F.2d 310 (7th Cir. 1971); *United States v. McCormick*, 442 F.2d 316 (7th Cir. 1971).

There was no significant interstate activity in this case. The defendants' activities were all local: Illinois residents, corporations, and trade associations seeking to bribe Illinois legislators to obtain a new Illinois law. There is no evidence in this record of any interstate activity with the single exception of Lauwereins' one trip to Indianapolis.

Lauwereins, an unindicted coschemer, travelled from Chicago to Indianapolis to meet with members of the Illinois Division-Midwest Ready-Mix Concrete Association (ID-MRCA), who were attending an annual convention there. The purpose of his trip was to inform them of the $50,000 bribe and to seek their support in raising the money. When the ID-MRCA refused to help, Lauwereins returned to Chicago.

There is no showing that the bribery scheme in any way depended on this one incident of interstate travel. That the members of the ID-MCRA were meeting in Indianapolis was completely fortuitous.[18] The assistance of ID-MRCA was not even necessary or essential to the scheme as the $50,000 bribe was raised without its help.[19]

This one trip cannot suffice to invoke jurisdiction under the travel act. The scheme involved here was outside the ambit of congressional concern—there is nothing about the scheme which suggests any reason why state police powers needed to be supplemented by the federal government. I would therefore hold that the interstate activity was "so minimal, incidental, and fortuitous, and so peripheral" to the scheme, *Isaacs*, *supra* at 1146, that it was error to submit these counts to the jury.

---

[18] The Midwest Ready-Mix Concrete Association has both Illinois and Indiana divisions. The annual convention alternates between the two states.

[19] *United States v. Peskin*, 527 F.2d 71 (7th Cir. 1975), *cert. denied*, ... U.S. ..... (1976), upon which the Government relies, is therefore distinguishable. In *Peskin*, it was essential that the defendant receive money to make the bribes. To obtain the money, the check had to clear the Detroit bank where it was drawn. Furthermore, the court in *Peskin* noted that the interstate scope of the unlawful activity was "clear." *Id.* at 78.

The recent case of *United States v. Burstein*, ... F.2d ..... (7th Cir. 1977), is also distinguishable. As in *Peskin*, the interstate clearance of the checks was "essential to the carrying on of the illegal activity." Sl. op. at 7.

III

Little need be said about Count One, the charge of conspiracy to use the mails to defraud. Where proof of the mailings is insufficient to establish the substantive counts and the alleged conspiracy was to commit the same offenses as charged in those counts, then the insufficiency of the mailings carries over to the conspiracy charge. *Parr v. United States*, 363 U.S. 370, 393 (1960). Equally important is the fact that the record is completely bare of evidence that any of the defendants or their coschemers ever contemplated, agreed, or intended to use the mails to further the execution of their scheme to defraud the citizens of Illinois.

I conclude by depicting a scenario which I have little doubt approximates the facts of this prosecution. Federal officials, getting wind of a deal between the Illinois state legislators and the ready-mix cement industry, assign agents to investigate. In due course, immunity is promised to some of the involved legislators and company officials in return for their cooperation and testimony. Recording devices are placed on some of the immunized persons to obtain inculpating admissions from those who are the targets of the prosecution. Once the investigation is completed, consideration is then given to what federal offense, if any, has been committed. The mail fraud statute? The federal travel act? The investigation files are searched to find some mailings or evidence of interstate travel. The United States Attorney's office sifts through the mailings in the file and then constructs a legal theory in order that they may be used to form the basis for a charge of mail fraud. One fortuitous trip, totally incidental and unforeseen, by an unindicted coschemer forms the basis of the two travel act counts. A conspiracy count is, of course, added. In this fashion, the mail fraud statute and the travel act are subverted to purposes for which they were never intended. No longer are the mailings and travel considered essential or an integral part of the scheme; they are seen and used as mere technicalities which are necessary to obtain federal jurisdiction. Naturally, the public is pleased, and rightfully so, that corrupt public officials

have been brought to book. But what of the prosecutor's responsibility to use the federal criminal laws only in a manner in which they were intended? Once the prosecutor determines that federal jurisdiction is lacking, his responsibility lies in cooperating with the state law enforcement officials and aiding the state in prosecuting the guilty. When he seeks convictions for crimes that are not within the federal jurisdiction, he acts irresponsibly and not in keeping with his high office. The court should not condone.

I would reverse.

APPENDIX A

Basis For Counts Two And Three

MOTOR VEHICLE LAWS
COMMISSION

STATE OF ILLINOIS.

GOVERNMENT EXHIBIT 2

NOTICE OF NEXT MEETING

DATE OF NOTICE: November 18, 1971

MEETING DATE: December 13, 1971, Monday - December 14, 1971, Tuesday.

TIME: 10:30 A.M.

PLACE: Room 200 - Registration and Education Hearing Room, State of Illinois Building, 160 North LaSalle, Chicago, Illinois.

COMMENTS: Draft of legislation re. safety test second division vehicles ---- Captain Lowder

Draft of legislation from Illinois Dump Truck Association.

Draft of legislation from cement haulers - ready-mix.

Reorganization of the Junked Vehicle Study -- opportunity to meet the Public Members -- Dr. James Greco; Mr. Edwin R. Haag; Mr. Walter P. Moffelder; Mr. Les Sander; Mr. Henry Davis and Mr. James A. Dupree. Possible itinerary for visit to Detroit regarding this to be presented by Mr. Dupree.

BUSINESS NOT RESOLVED ON MONDAY TO BE CARRIED OVER FOR MEETING TUESDAY, DECEMBER 14th, SAME ROOM AND PLACE. TIME TO BE ANNOUNCED BEFORE ADJOURNING MONDAY.

PETE PAPPAS, Co-Chairman

APPENDIX B

Basis For Counts Four And Five

MOTOR VEHICLE LAWS
COMMISSION

STATE OF ILLINOIS.

NOTICE OF NEXT MEETING

DATE OF NOTICE: December 28, 1971

MEETING DATE: January 10, 1972 - Monday & January 11, 1972 - Tuesday.

TIME: January 10 - 10:30 A.M. & January 11 - 10:00 A.M.

PLACE: N-1, State House
Springfield, Illinois

COMMENTS: Consideration of material re. draft legislation -- safety st second division vehicles submitted by Capt. Lowder (postponed from c. 13th meeting since Capt. Lowder nor a representative was present).

aler Plates legislation submitted by Seymour Lewis, Ill. Auto Trade Assoc.

iggyback semi-trailer licensing requested by Sen. Carpentier.

rther discussion of proposed formula change--licensing and proration of truc

tudy of studded tires requested by Sen. McCarthy.

gislation presented by Governor's Traffic Safety Coordinating Committee re. c state agency to administer approval of equipment.

nsular Corps plates - Secretary of State

port from subcommittee (Senators Carpentier, Course and Representative ppas appointed 12/14/71 meeting to handle both the dump truck and ady mix matter.

DESDAY, Jan. 11 - 10:00 A.M.: Meet with Wisconsin Officials and any unfinish siness carried over from Monday's meeting. PETE PAPPAS, Co-Chairman

App. 146

APPENDIX C

Basis For Counts Six And Seven

NORTHERN ILLINOIS READY MIX AND MATERIALS ASSOCIATION
228 North La Salle Street • Chicago, Illinois 60601 • FR 2-0750

March 24, 1972

Accurate Ready Mix Concrete Co.
171st Street & Center Avenue
Hazel Crest, Illinois 60429

Gentlemen:

Your Board of Directors has reviewed and considered the fact that our Reserve Capital has reached a level which the Directors feel is more than adequate to accommodate current and reasonably foreseeable expenses.

Accordingly, the Board has resolved that dues for Regular Members shall be waived for the months of April, May, and June, 1972.

Yours very truly,

Frank Sheahen,
President

FS:gg

App. 147

APPENDIX D

Basis For Count Eight

Waterfall 8-5333
DEwey 5-1616

ACCURATE

171st. & Center Ave. 3 Blocks West of Halsted Street. East Hazel Crest, Illinois

Aprul 27, 1972

Tom Connolly, Executive Secretary
Northern Illinois Ready-Mix
and Materials Association
228 North LaSalle Street
Chicago, Illinois 60601

Dear Tom:

My Labor Committee expenses for the period July 1, 1971 thru December 31, 1971 were $500.00.

Very truly yours,

Bernard Arquilla,
Chairman, Labor Committee

BA:b

Labor Committee Expense
re
Golf Outing Club #1797
5/1/72

App. 148

APPENDIX E

Basis For Count Nine

To the Northern Illinois Ready Mix and Materials Association

During the months of January, February, and March, I have had the following expenses serving as co-chairman of the Transporration Committee researching truck weight laws:

January 10 - 11 Trip to Springfield, Illinois	
460 miles @ .15¢/mile	$ 69.00
Lodging	40.00
Meals	35.00
Entertainment	40.00
	$184.00
January 24 - 25 Trip to Springfield, Illinois	
460 miles @ .15¢/mile	$ 69.00
Lodging	20.00
Meals	25.00
Entertainment	35.00
	$149.00
February 15 - 16 Trip to Indianapolis, Indiana	
420 miles @ .15¢/mile	$ 63.00
Lodging	40.00
Meals	28.00
Entertainment	30.00
	$161.00
February 24 - 25 Trip to Springfield, Illinois	
460 miles @ .15¢/mile	$ 69.00
Lodging	20.00
Meals	30.00
Entertainment	25.00
	$144.00
March 7 - 8 Trip to Lansing, Michigan	
560 miles @ .15¢/mile	$ 94.00
Lodging	25.00
Meals	30.00
	$149.00
March 27 - 28 Trip to Springfield, Illinois	
460 miles @ .15¢/mile	$ 69.00
Lodging	20.00
Meals	24.00
Entertainment	20.00
	$133.00
TOTAL	$920.00

M. A. Lauwereins

Check #1795

App. 149

APPENDIX F

Basis For Count Ten

NEWS BULLETIN

MRCA

NEWS OF INTEREST TO ILLINOIS READY-MIX PRODUCERS

ILLINOIS DIVISION - MIDWEST READY-MIXED CONCRETE ASSOCIATION

620 REISCH BUILDING
Springfield, Illinois 62701
Phone (217) 544-1686

June 22, 1972

FLASH-FLASH-FLASH

SENATE PASSES HB-4176 - TRUCK LEGISLATION
NOW GOES TO THE GOVERNOR

Today was an eventful legislative day for our [illegible]. The Illinoi Senate passed, by the narrowest of margins, our all-important truck weight bill -- HB-4176. After a resounding performance in the House wher the vote margin reached nearly 140, the Senate today supported our positi by passing the bill by a vote of 30-8 --- precisely the number of votes needed to move the legislation to the Governor's desk.

With the Governor's signature, new ready-mix truck gross and axle weight will become law -- with an effective date of July 1, 1972.

Support for our bill came from all corners of the state with 10 downstate, 5 suburban Chicago and 15 city of Chicago votes being cast in our favor. Bi-partisan support also was apparent with 19 Democrats and 11 Republicans voting aye. All of you who contacted your Senator deserves a big vote of thanks.

BUT----------WE'RE NOT HOME YET!

PLEASE IMMEDIATELY WIRE THE GOVERNOR URGING HIM TO SIGN THE BILL --- AND, IF YOU ARE PERSONALLY ACQUAINTED WITH HIM --- CALL HIM DIRECTLY. IF WE ARE TO SUCCESSFULLY WRAP UP THIS TOTAL INDUSTRY LEGISLATIVE EFFORT, YOUR ACTION IS NEEDED TODAY! STRONGLY URGE THE GOVERNOR TO SIGN HB-4176 AND HB-4177 (another important association sponsored bill increasing the allowance on mileage tax plates to 12,000 miles).

REMEMBER:

1. THE BILL NUMBERS ARE HB-4176 and 4177.
2. CONTACT THE GOVERNOR TODAY!

GOVERNMENT EXHIBIT 10

APPENDIX G

Basis For Count Eleven

NORTHERN ILLINOIS READY MIX AND MATERIALS ASSOCIATION
228 North La Salle Street
Chicago, Illinois 60601

June 23, 1972

U R G E N T

To: All Members

Subject: Truck Legislation - HB-4176

On Thursday, June 22, 1972, the Illinois Senate passed, by the narrowest of margins, the all important truck weight bill - - HB 4176. After it had been passed in the Illinois House by a margin of nearly 140 votes, the Senate passed it by a vote of 30 to 8, precisely the number of votes needed to move the legislation to the Governor's desk.

With the Governor's signature, new ready-mix truck gross and axle weights will become law.

Support for the bill came from all corners of the state with 10 down-state, 5 suburban Chicago and 15 City of Chicago votes being cast in favor of the bill. Bi-partisan support also was apparent with 19 Democrats and 11 Republicans voting 'Aye'.

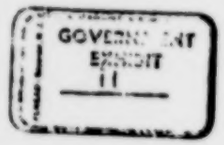
NOW - THE GOVERNOR'S SIGNATURE IS NEEDED TO MAKE THIS LAW AND YOUR HELP IS NEEDED IN ACCOMPLISHING IT. PLEASE IMMEDIATELY WIRE THE GOVERNOR URGING HIM TO SIGN THE BILL. YOUR ACTION IS NEEDED TODAY!

REMEMBER:

1 - THE BILL NUMBER IS HB-4176
2 - CONTACT THE GOVERNOR TODAY

Yours very truly,

THE TRANSPORTATION COMMITTEE



APPENDIX H

Basis For Count Twelve



Senator Jack E. Walker
18018 Arcadia Avenue
Lansing, Illinois, 60438

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX E

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

March 21, 19 78

Before

Hon. LUTHER M. SWYGERT, Circuit Judge *

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. WILLIAM J. CAMPBELL, Senior District Judge**

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

Nos. 76-2089, 76-2090, vs.
76-2092 and 76-2093

ROBERT CRAIG, FRANK P. NORTH, JR., PETER P. PAPPAS and JACK E. WALKER,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 74-Cr-879
George N. Leighton, Judge

On consideration of the petitions for rehearing and suggestions for rehearing *in banc* filed in the above-entitled cause by counsel for the defendants-appellants, no judge in active service has requested a vote thereon, and a majority of the judges on the original panel have voted to deny a rehearing. Accordingly,

It is ordered that the aforesaid petitions for rehearing be, and the same are hereby, DENIED.

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* Hon. Luther M. Swygert, Circuit Judge, voted to grant the petitions for rehearing *in banc*.

** Hon. William. J. Campbell, Senior District Judge for the Northern District of Illinois, is sitting by designation.

Hon. Harlington Wood, Jr., Circuit Judge, did not participate in the consideration of the petitions for rehearing *in banc*.

APPENDIX F

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

March 22, 19 78

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. WILBUR F. PELL, JR., Circuit Judge

Hon. WILLIAM J. CAMPBELL, Senior District Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 77-1364 vs.

ROBERT CRAIG and LOUIS A. MARKERT,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 74 CR 877
Alfred Y. Kirkland, Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the convictions of the said District Court in this cause appealed from be, and the same are hereby, AFFIRMED, in accordance with the opinion of this court filed this date.

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* Senior District Judge William J. Campbell, Northern District of Illinois, is sitting by designation.

In the Supreme Court of the United States

OCTOBER TERM, 1977

FRANK P. NORTH, JR., PETITIONER

v.

UNITED STATES OF AMERICA

JACK E. WALKER, PETITIONER

v.

UNITED STATES OF AMERICA

PETER V. PAPPAS, PETITIONER

v.

UNITED STATES OF AMERICA

ROBERT CRAIG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1499

FRANK P. NORTH, JR., PETITIONER

v.

UNITED STATES OF AMERICA

No. 77-1500

JACK E. WALKER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 77-1501

PETER V. PAPPAS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 77-1502

ROBERT CRAIG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 59-151) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1977. A petition for rehearing was denied on March 21, 1978, and the petitions for a writ of certiorari were filed on April 20, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a state legislator is privileged to prevent introduction of evidence of his legislative acts in a federal criminal prosecution.

2. Whether the evidence regarding use of the mails and interstate travel was sufficient to prove violations of the mail fraud statute, 18 U.S.C. 1341, and the Travel Act, 18 U.S.C. 1952.

3. Whether specific intent to use the mails must be proven as to a defendant convicted of conspiracy to commit mail fraud.

4. Whether recordings of conversations of petitioners Craig, Walker, and Pappas were properly admitted into evidence in the circumstances of this case.

5. Whether exculpatory materials were improperly withheld from petitioner Walker (No. 77-1500).

6. Whether the rule of *Dunn* v. *United States*, 284 U.S. 390, permitting inconsistent verdicts, should be overruled (No. 77-1499).

7. Whether petitioner Craig is entitled to a new trial by reason of his tactical decision to rely on an earlier opinion of the court below on the legislative privilege issue (No. 77-1502).

8. Whether petitioners were prejudiced by joinder of a co-defendant's perjury indictment.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of conspiracy to commit mail fraud, in violation of 18 U.S.C. 371 and 1341. Petitioners Craig and Pappas were convicted on 11 substantive counts, and petitioners Walker and North were convicted on three substantive counts, all in violation of 18 U.S.C. 1341. In addition, petitioners Craig and Pappas were convicted on two counts of interstate travel to commit bribery, in violation of 18 U.S.C. 1952. Petitioners Craig, Walker, and North were sentenced to concurrent terms of three years' imprisonment and a fine of $5,000; petitioner Pappas was sentenced to five years' imprisonment and a fine of $10,000. The court of appeals affirmed in a lengthy opinion, with one judge dissenting (Pet. App. 59-151).[1]

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[1] "Pet. App." refers to the joint appendix filed by petitioners in Nos. 77-1499, 1500, 1501, 1502 and 1504.

The evidence is set forth in detail in the opinion of the court of appeals. Briefly, it showed that certain members of a trade association, the Northern Illinois Ready-Mix and Materials Association (NIRMMA), wanted to increase the weight limit on ready-mix cement that could lawfully be hauled by its members' trucks on Illinois state roads. At an October 1971 meeting of the NIRMMA board, it was determined that the time was ripe for the introduction of a weight-relief bill in the Illinois legislature. NIRMMA member James McBride knew petitioner Peter Pappas, a lobbyist with the Illinois Motor Vehicle Laws Commission, which had initial jurisdiction to draft and consider such a bill. McBride predicted that getting the bill enacted would cost a great deal of money; two other NIRMMA board members estimated that the cost of enacting the bill might reach $100,000 (Pet. App. 61-62). Shortly thereafter, McBride, unindicted co-conspirator Lauwereins, and several other NIRMMA members met with petitioner Pappas to discuss passage of the bill; Pappas advised them that his fee would be $5,000 and that more money would be required later (Pet. App. 61-62).

At some time in October or early November 1971, petitioner Pappas contacted Republican state representative Pete Pappas (no relation), a member of the Motor Vehicle Laws Committee (MVLC), and advised him that the industry representatives were willing to pay for passage of the weight relief bill (Pet. App. 62-63). Rep. Pappas then separately spoke

with co-defendant Donald Carpentier, a Republican state senator and also a member of the MVLC, and with petitioner Craig, a Democratic state representative; Rep. Pappas told them of the industry's willingness to pay for passage of the bill (Pet. App. 63). After a few days, Craig contacted Rep. Pappas and advised him that the fee for the Democratic side of the state House would be $10,000; Rep. Pappas and Carpentier followed this lead and determined that it would require $10,000 each for the Republican sides of the state House and Senate (*ibid.*). Craig said the money ought to be paid as the bill passed each house. Rep. Pappas proceeded to talk with Democratic state Senator Kenneth Course, and the latter agreed to participate (Pet. App. 64).[2] Petitioner Pappas was then advised of the sum involved and of the requirement that it be paid as soon as the legislation passed each house (Pet. App. 66).

On November 5, 1971, petitioner Pappas met with several NIRMMA members, advised them that the bill would be first introduced through the MVLC, and left the members with the understanding that any payment beyond his $5,000 fee would be required only if the bill passed both houses of the legislature and was signed by the governor (Pet. App. 64-65). On November 8, 1971, petitioner Pappas met with ID-MRCA[3] member Herbert Craig (no relation to peti-

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[2] Course was also convicted at trial, but he died while the appeal was pending.

[3] ID-MRCA was a down-state trade association (Illinois Division—Midwest Ready-Mix Concrete Association) that in-

tioner Craig) and several NIRMMA members to rehearse Craig's testimony before the MVLC, scheduled for the next day. Shortly after the MVLC meeting, the Commission secretary mailed notices of the date, time and place for the December 1971 meeting of the Commission. One of the persons on the mailing list was NIRMMA executive secretary Tom Connolly (Pet. App. 66).

At the December 1971 meeting of the MVLC, a subcommittee that included Course, Carpentier, and Rep. Pappas was created to consider the bill that had been drafted at the request of petitioner Pappas (Pet. App. 67). After this meeting, notices concerning the agenda of the January 1972 meeting of the Commission were mailed out.

The day of the January MVLC meeting, McBride met with fellow NIRMMA member Wille and told him that petitioner Pappas had said that the fee for passage of the ready-mix industry bill would be $50,000 in cash, to be paid only if the bill became law (Pet. App. 67). To collect the $50,000, NIRMMA members ultimately decided to assess each member $40 per truck in operation (Pet. App. 68). In addition, Lauwereins travelled from Chicago to Indianapolis on February 29, 1972, where he addressed members of the ID-MRCA in a hotel room. He attempted unsuccessfully to convince the ID-MRCA members to contribute to the $50,000 fund to obtain the weight relief legislation (Pet. App. 68-69).

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cluded businesses that would also benefit from the weight-relief legislation (Pet. App. 64).

During March 1972, NIRMMA members accumulated all but $3,160 of the $50,000 sought. False expense vouchers were sent by mail to NIRMMA to reimburse one company for the advance of the $3,160. The checks issued by NIRMMA were in turn cashed by the individuals who submitted the false vouchers, and the contributor was given the proceeds (Pet. App. 69-70). After petitioner Pappas counted the money, the $50,000 fund was deposited in a safe deposit box in Chicago (Pet. App. 68, 70).

Shortly before the industry bill was introduced in the state legislature in April 1972, petitioner Pappas informed Sen. Carpentier and Rep. Pappas that the fund was ready. Later that month, petitioner Pappas advised Rep. Pappas that the industry would pay when the governor signed the bill (Pet. App. 70-71). Rep. Pappas pointed out that the legislators' agreement had been otherwise. He contacted Craig, and the two spoke with petitioner Pappas. Craig offered a compromise: payment would be made after the bill passed both houses of the legislature, irrespective of what the governor might do. A few days later, petitioner Pappas informed Rep. Pappas that the industry would agree to the compromise (Pet. App. 71).

In early May 1972, Carpentier spoke with ten Republican senators—one of them, petitioner Jack E. Walker, agreed to support the bill in return for "help in his district" (Pet. App. 71). Carpentier told Course that eleven Republican votes could be delivered in the Senate and that Course would have to make up the rest (Pet. App. 72). In return for an extra $500,

petitioner Walker later took over sponsorship of the bill in the Senate (*ibid.*).

In June 1972, while the bill was pending in a Senate committee, defendant Herbert Craig of ID-MRCA received an urgent call from Lauwereins. The latter said that the bill was in danger and that petitioner Pappas needed $500 immediately. Lauwereins said he would prepare a false voucher to NIRMMA to reimburse Craig; the latter, along with Chalden, the executive secretary of ID-MRCA, prepared and cashed a $500 check, and Herbert Craig delivered the money to petitioner Pappas (Pet. App. 72).

The bill passed the Senate on June 21, 1972, and the industry requested its members, through bulletins mailed to them, to urge the governor to sign the bill. At the same time, the legislators were eager to receive their payments, but Rep. Pappas was rebuffed after speaking with McBride, Lauwereins, and petitioner Pappas (Pet. App. 73-74). After the governor vetoed the bill on August 8, 1972, Course began to make inquiries about his "campaign contribution" (Pet. App. 74).

The industry representatives decided not to pay the original $50,000 because their understanding of the agreement was that payment would only be required if the bill was signed into law. However, they decided to raise an additional $30,000 to be provided by two companies to compensate the legislators for their services (Pet. App. 74-75). In response to further requests for payment from Rep. Pappas, the $30,000 was raised in September 1972 and was turned over

to petitioner Pappas around the end of the month (Pet. App. 76).

Petitioner Pappas in turn delivered $5000 in cash in an envelope to Course; the latter divided the money among several Democratic state senators. On September 25, 1972, petitioner Pappas met by prearrangement with Rep. Pappas, Carpentier, and petioner Frank P. North; an envelope containing $10,000 in cash was given to Rep. Pappas (Pet. App. 77). The latter gave $1,000 to North and $5,000 to Carpentier (Pet. App. 78). A few days later Carpentier mailed $500 to petitioner Walker and $100 each to eight other state senators (Pet. App. 78-79).

After deciding against a veto override attempt on the advice of Course and Rep. Pappas, the industry representatives removed the $50,000 fund from the safety deposit box and redistributed it to the contributors (Pet. App. 79).

Carpentier was subpoenaed to appear on May 29, 1973, before the grand jury that eventually returned the indictment in this case. Petitioner Pappas advised him to deny everything, which he did (Pet. App. 79). Two months later, Craig, Rep. Pappas and petitioner Pappas met. Petitioner Pappas informed the others that he had been visited by two federal prosecutors about the cement bill legislation. Petitioner Pappas offered to concoct a story for the grand jury if Craig and Rep. Pappas would each give him $5,000. Petitioner Pappas also made a similar offer to Carpentier, but neither Carpentier nor Rep. Pappas gave him the money (Pet. App. 79-80).

ARGUMENT

1. Petitioners first contend that as state legislators they were entitled to the benefit of a federal common-law "legislative privilege," which, they claim, bars inquiry into their legislative activities and requires dismissal of an indictment involving such acts.[4] This claim is also raised in the companion case of *Markert* v. *United States*, No. 77-1504. However, despite dicta to the contrary in *In re Grand Jury Proceedings*, 563 F.2d 577 (C.A. 3), there is no common law privilege that immunizes the acts of state legislators or that bars the receipt of evidence bearing on such acts in a criminal prosecution in federal court. The same arguments in support of a legislative privilege claim were recently raised in *DiCarlo* v. *United States*, No. 77-990, and this Court denied certiorari on March 20, 1978. We rely on the analysis contained in our brief in opposition in *DiCarlo*, as well as the analysis in our brief in opposition in *Markert* v. *United States*, No. 76-179, certiorari denied, 429 U.S. 999. Copies

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[4] All petitioners have joined in this argument by adoption, either specifically (Pet. No. 77-1500, p. 19; Pet. No. 77-1501, p. 8; Pet. No. 77-1502, p. 16) or by general adoption of the other petitioners' arguments (Pet. No. 77-1499, p. 2).

We note that petitioner Pappas has no standing to raise this claim. Although admitting that he was not a legislator, he contends (*id.* at 8) that he drafted the bill in question as an "aide" to legislators. However, his soliciting of money from industry representatives and his other acts in furtherance of the scheme were not, by any conceivable interpretation, acts performed as a part of or incidental to the role of a legislator. See *United States* v. *Brewster*, 408 U.S. 501, 526.

of our briefs in opposition in those cases are being forwarded to counsel for petitioners herein.

2. Petitioners contend (Pet. No. 77-1500, pp. 11-12; Pet. No. 77-1501, pp. 9-12; Pet. No. 77-1502, pp. 17-18) that the instant prosecution represents federal overreaching under the mail fraud statute, 18 U.S.C. 1341, and the Travel Act, 18 U.S.C. 1952. They rely chiefly upon the dissenting opinion of Judge Swygert, who thought that the mailings were not sufficiently central to the bribery scheme and the interstate travel not so significant as to warrant federal intervention (Pet. App. 127-143). The majority below, in a thorough opinion, found that the mailings and interstate travel were sufficiently related to the scheme to justify application of the two statutes to petitioners. This essentially factual determination by the court of appeals does not merit further review. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 636. It is, moreover, amply supported by the record.

a. It is true, as petitioners note, that the mailings must be for the purpose of executing the scheme. *United States* v. *Maze*, 414 U.S. 395, 399-400; *Kann* v. *United States*, 323 U.S. 88, 94. However, it is not necessary that the scheme specifically contemplate the use of the mails; it is sufficient if the mailings were incident to an essential part of the scheme. *Pereira* v. *United States*, 347 U.S. 1, 8; *United States* v. *Buchanan*, 544 F. 2d 1322, 1325 (C.A. 5), certiorari denied, 432 U.S. 907; *United States* v. *Perkal*, 530 F.2d 604, 607 (C.A. 4), certiorari denied, 429 U.S. 821; *United States* v. *Street*, 529 F.2d 226, 228 (C.A. 6).

Petitioners' scheme here had the ultimate purpose of securing, through bribery, passage in the Illinois legislature of a weight relief bill for ready-mix industry cement trucks. The core of the plan was the collection of bribery funds from a host of member firms and the dissemination of such funds to an almost equally numerous group of corrupt legislators. The mailings made in furtherance of the plan fall into three groups: those between co-conspirators concerning the passage of the cement bill; those that facilitated the gathering of the bribe funds; and those that resulted in a distribution of the funds to state legislators.

The first group includes the mailings in counts 2-5 (notices of MVLC meetings and agenda) and 10-11 (bulletins to industry representatives to urge the governor to sign the bill) (Pet. App. 96-98, 101). The MVLC mailings "served to inform the recipients of the status of their sought-after proposal in the MVLC so that the steps necessary to secure its passage could be taken" (Pet. App. 99). These mailings thus furthered and promoted the scheme. The bulletins involved in counts 10 and 11 sought to achieve the ultimate purpose of the scheme, *i.e.*, the signing into law of the cement bill, and thus were also in furtherance of the scheme, as the court below held (Pet. App. 101-102).

The second group of mailings, those concerning the gathering of the bribe funds, involve counts 6 and 7 (dues abatement letters mailed to NIRMMA members) and counts 8 and 9 (fraudulent expense vouchers mailed to NIRMMA to reimburse one of the contributors to the bribe fund) (Pet. App. 96, 99-100). The fund was collected by assessing each NIRMMA member $40 per each truck which he operated. As petitioner Craig conceded below (Pet. App. 99-100), the purpose of spreading the assessment among all the members and remitting dues through the letters in question was to "soften the blow"—and therefore to make more likely the prospect of collecting all of the money needed for the bribery fund. Hence, the broad-based collection was an essential element of the scheme which simply could not have been effective without the low cost and relative speed provided by using the mails. The court below therefore properly concluded that the mailings involved in these counts were both foreseeable and essential to consummate the scheme (Pet. App. 100).

The final mailing, that of $500 to petitioner Walker from Sen. Carpentier (count 12), was a distribution of a portion of the bribery fund in consummation of the bribery scheme. As such, it was clearly incident to an essential element of the scheme, *i.e.*, the bribery of state legislators, and was reasonably foreseeable. *United States* v. *Maze*, *supra*, 414 U.S. at 400-401; *Pereira* v. *United States*, *supra*; *United States* v. *Barrett*, 505 F.2d 1091, 1104 n. 11 (C.A. 7).[5]

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[5] We would also point out that, because concurrent sentences were imposed in this case, it is unnecessary to review the adequacy of the evidence under each separate count of the indictment. *See, e.g., Barnes* v. *United States*, 412 U.S. 837, 848 n. 16.

b. There is no merit in the argument of petitioners Craig (Pet. No. 77-1502, pp. 17-18) and Pappas (Pet. No. 77-1501, pp. 10-12) that the degree of interstate travel underlying their convictions on counts 13 and 14 was insufficient to warrant conviction under the Travel Act, 18 U.S.C. 1952.

The gravamen of these counts was co-conspirator Lauwereins' travel to Indianapolis, Indiana, in February 1972 to attempt to enlist ID-MRCA's aid in contributing to the bribe fund. Given the magnitude of the benefit petitioners and those paying the bribes hoped to achieve by procuring passage of the bill and the concomitant need to raise funds from all of those who stood to gain by it, the court below correctly held that travel for this purpose was more than "minimal" or "incidental" and thus sufficient to warrant application of the Travel Act (Pet. App. 111-112). Indeed, the trip was viewed by the conspirators as an "important" episode in the fund raising campaign. *Ibid.* This distinguishes the present case from *United States* v. *Isaacs*, 493 F.2d 1124, 1146 (C.A. 7), certiorari denied, 417 U.S. 976, on which petitioners rely, since in *Isaacs* a check drawn on an Illinois bank account to distribute bribery proceeds fortuitously happened to clear through an out-of-state bank. Here, the interstate travel was both planned and undertaken to achieve an essential step in the fraudulent scheme.[6]

[6] Again, it is not necessary to reach the validity of the convictions on these counts because of the concurrent sentences that were imposed. *Barnes* v. *United States*, 412 U.S. 837, 848, n. 16.

3. Petitioner Walker also contends (Pet. No. 77-1500, pp. 12-14) that specific agreement and intent to use the mails is an essential element of the offense of conspiracy to commit mail fraud.[7] The court of appeals, in a thorough analysis upon which we rely (Pet. App. 103-106), held that since the substantive offense does not require an intent to use the mails, conspiracy to commit the offense could not require a greater mental state than the underlying substantive offense. The court noted that petitioners were arguing in effect that they had to have knowledge of the federal jurisdictional basis of their offense, an argument laid to rest by *United States* v. *Feola*, 420 U.S. 671, 694. Since guilt of the substantive offense of mail fraud does not require an intent to use the mails, but may be established by proof that the scheme to defraud caused a use of the mails (*Pereira* v. *United States*, *supra*, 347 U.S. at 8-9), the decision below is correct in this regard and does not merit further review.

4. Petitioners Craig, Pappas, and Walker raise several arguments with respect to certain recordings of their conversations introduced into evidence at

[7] The district court's charge emphasized that the government must prove beyond a reasonable doubt "that the defendant, with knowledge of the purpose of the conspiracy, and reasonably foreseeing a use of the mails in furtherance thereof, willfully became a member of the conspiracy * * *" (Pet. App. 103). This charge was based firmly on *Periera* v. *United States*, *supra*, 347 U.S. at 8-9.

trial.[8] Craig and Pappas were overheard in face-to-face conversations with Rep. Pappas, and Walker was recorded in telephone calls with Carpentier (Pet. App. 81, 85-87, 89). Their claims are meritless and do not warrant further review.

a. Pappas and Craig first contend (Pet. No. 77-1501, pp. 27-33; Pet. No. 77-1502, pp. 18-20) that Rep. Pappas did not consent to the recording of his conversations, so that the "color of law" exception of 18 U.S.C. 2511(2)(c) for consensual interceptions was improperly invoked.[9] The court of appeals held, in an opinion on which we rely (Pet. App. 85-89), that Rep. Pappas agreed to cooperate with the government prior to recording any conversations with petitioners. The court below correctly noted that although a formal plea agreement was not signed until after two of the conversations had been recorded, Rep. Pappas was clearly cooperating with the government at the time of the recordings, and that "every aspect of the recording of the conversations * * * was supervised by the government" (Pet. App. 86-87). Indeed, a gov-

[8] Petitioner North was not overheard in any conversations, and no such recording was directed against him (Pet. App. 94). He therefore is not an "aggrieved person" within the meaning of Title III and lacks standing to challenge the validity of the recordings. See 18 U.S.C. 2518(10)(a) and 2510(11); see also *Alderman* v. *United States*, 394 U.S. 165, 171-173.

[9] Petitioner Walker concedes that Carpentier consented to the recording of his conversations; he does not here pursue the claim raised below that Carpentier's consent was legally invalid. See Pet. App. 82, n. 13.

ernment agent set up the recording equipment for Rep. Pappas, operated the equipment, and took custody of the equipment and the tapes thereafter (*ibid.*). See *United States* v. *Hall*, 536 F.2d 313, 317, 327 (C.A. 10), certiorari denied, 429 U.S. 919; *United States* v. *Ransom*, 515 F.2d 885, 890 (C.A. 5), certiorari denied, 424 U.S. 944; *United States* v. *Armocida*, 515 F.2d 49, 52 (C.A. 3), certiorari denied, 423 U.S. 858.[10] This factual resolution by the courts below does not require further review. *Berenyi* v. *Immigration Director*, *supra*.

b. Petitioners Craig and Pappas also contend (Pet. No. 77-1502, pp. 19-20; Pet. No. 77-1501, p. 4) that 18 U.S.C. 2511(2)(c), which removes criminal penalties for those who intercept conversations under "color of law," does not authorize the use at trial of the fruits of such an interception. Petitioners' argument appears to be that Section 2511(1)(b), which prohibits the use of a recording device to intercept an

[10] *United States* v. *Bynum*, 360 F. Supp. 400, 408-409 (S.D. N.Y.), affirmed, 485 F.2d 490 (C.A. 2), vacated on other grounds, 417 U.S. 903, appeal after remand, 513 F.2d 533, certiorari denied, 423 U.S. 952; and *Smith* v. *Wunker*, 356 F. Supp. 44, 46 (S.D. Ohio), are not to the contrary. Rather, they hold that the mere recording of a conversation by a party to it, for later revelation to the government, is not even an "interception" within the meaning of Title III. Since the recording by Rep. Pappas here also was for later revelation to the government, it is difficult to understand how the storing of his recordings could invalidate the procedure. See also 18 U.S.C. 2511(2)(d), authorizing a person, not acting under color of law, to intercept communications to which he is a party where he has no purpose to commit a criminal or tortious act.

oral conversation, also bars evidentiary use of the recording of a lawfully intercepted conversation. The plain language of Section 2511(1)(b) shows, however, that it is concerned with the unauthorized invasion of privacy rights; it has nothing to do with evidentiary use of legitimately intercepted conversations. Use at trial of the fruits of an interception is instead governed by 18 U.S.C. 2517(3), which requires a threshold determination that the interception was authorized under Title III. See *United States* v. *Armocida, supra*, 515 F.2d at 52 ("18 U.S.C. §§ 2511 (2)(c) and 2517(3), taken together, specifically authorize the admission into evidence of warrantless recordings [where one of the parties has consented]"); see also *United States* v. *Harvey*, 540 F.2d 1345, 1352-1353 (C.A. 8); *United States* v. *Marion*, 535 F.2d 697, 707 (C.A. 2); *United States* v. *Clegg*, 509 F.2d 605, 612-613 (C.A. 5).

c. Next, petitioners contend (Pet. No. 77-1501, pp. 15-23) that the recordings should not have been admitted because of purported failures to demonstrate the chain of custody of the tapes and to seal them promptly. The court of appeals held that notwithstanding a lack of proof at trial of strict chain of custody, the purpose of the rule—to show that the item is in the same condition as it was when received by the proponent—was satisfied by reliable proof. Representative Pappas, who participated in the conversations, testified that the tapes accurately reflected such conversations, and an expert witness, Prof. Weiss, testified that in his opinion the tapes had not

been altered (Pet. App. 90-91). Under these circumstances, the court below properly held that the district court had not abused its discretion in accepting the government's foundation for the admission of the evidence. *United States* v. *Nace*, 561 F.2d 763, 771 (C.A. 9); *United States* v. *Biggins*, 551 F.2d 64, 66-67 (C.A. 5); *United States* v. *Cosby*, 500 F.2d 405, 406 (C.A. 9); *United States* v. *Avila*, 443 F.2d 792, 795-796 (C.A. 5), certiorari denied, 404 U.S. 944; Rule 901, Fed. R. Evid.

Nor was there any error in the failure to present the tapes to the district court for sealing. We rely on the reasoning of the court below that Congress exempted consensual interceptions from the requirements of Title III, including the sealing requirement of 18 U.S.C. 2518(8)(a) (Pet. App. 93).

d. Petitioners also contend (Pet. No. 77-1501, pp. 23-27) that their Fourth Amendment rights were violated by the consensual recordings here. As the court below concluded (Pet. App. 81-82), petitioners have no legitimate Fourth Amendment interest here, "for that Amendment affords no protection to 'a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it'" (Pet. App. 82, quoting from *Hoffa* v. *United States*, 385 U.S. 293, 302). See also *United States* v. *White*, 401 U.S. 745, 749; *United States* v. *Jones*, 545 F.2d 1112, 1114 (C.A. 8), certiorari denied, 429 U.S. 1075; *United States* v. *Hodge*, 539 F.2d 898, 905 (C.A. 6), certiorari denied, 429 U.S. 1091; *United States* v.

Bastone, 526 F.2d 971, 978 (C.A. 7), certiorari denied, 425 U.S. 973.

e. Next, petitioners Walker (Pet. No. 77-1500, pp. 17-18) and Pappas (Pet. No. 77-1501, pp. 43-45) contend that the rule of *Massiah* v. *United States*, 377 U.S. 201, excluding evidence of post-indictment interrogations of a defendant in the absence of counsel, should be extended to pre-indictment and pre-arrest situations. They argue that at the time their conversations were recorded, the government already had enough evidence to return an indictment against them, so the delay was purely for the convenience of the government in order that more evidence could be elicited. The right to counsel, however, which is the basis of *Massiah*, does not attach until the institution of formal criminal proceedings. *Kirby* v. *Illinois*, 406 U.S. 682. Moreover, as the court below properly held (Pet. App. 84), there was no evidence suggesting any delay in this investigation of a complex, multi-party scheme and there is no requirement that the government cease an investigation once probable cause is obtained. See *Hoffa* v. *United States*, *supra*, 385 U.S. at 309-310.

f. Petitioner Pappas also argues (Pet. No. 77-1501, pp. 36-39) that the recordings here were not obtained in compliance with guidelines promulgated by the Attorney General. He raised this claim prior to trial, but he then abandoned it, as he now concedes (*id.* at 38). It was not until the court below had affirmed his conviction that he moved for further discovery and hearings in the district court. He had his opportunity to delve into the matter prior to trial, yet he chose not

not pursue it further. As the government documented in its February 21, 1978, memorandum opposing further hearings on this subject, petitioner had ample information before him to pursue his claim of guideline infraction, but elected not to do so and thus waived the claim under Rule 12(f), Fed. R. Crim. P. The resolution of this factual question under Rule 12(f) warrants no further review.[11]

5. Petitioner Walker contends (Pet. No. 77-1500, pp. 14-17) that exculpatory materials, in the form of interviews with nine state senators whose information contradicted Senator Carpentier's testimony, was improperly withheld from him. The record shows that prior to trial Walker knew the identities of each of these senators and had in fact spoken with all but one or two of them; all had denied receiving money from Carpentier (Pet. App. 117). Moreover, Walker was offered the opportunity by the district court to subpoena the senators and have a hearing outside the presence of the jury to elicit the information he was seeking, but he declined that offer (*ibid.*). Accordingly, since the witnesses were already known by Walker, and since he also knew the substance of their testimony, he was not prejudiced and no suppression of favorable testimony occurred. See, *e.g.*, *United States* v. *Agurs*, 427 U.S. 97, 103; *Stubbs* v. *Smith*, 533 F.2d 64, 67 n. 5 (C.A. 2); *United States* v.

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[11] There is, accordingly, no occasion to hold this case pending disposition of *United States* v. *Caceres*, No. 76-1309, certiorari granted, June 5, 1978, where a similar argument is raised.

Akin, 464 F.2d 7, 8 (C.A. 8), certiorari denied, 409 U.S. 981.

6. Petitioner North (Pet. No. 77-1499, pp. 5-12) urges this Court to reconsider its holding in *Dunn* v. *United States*, 284 U.S. 390, that inconsistent verdicts are permissible.[12] Despite his recognition that *Dunn* has been followed "by numerous federal judges in the past 46 years" (*id.* at 5-6), he argues that this Court's subsequent decisions in *Sealfon* v. *United States*, 332 U.S. 575, which applied the principle of *res judicata* to separate prosecutions, and *Ashe* v. *Swenson*, 397 U.S. 436, which applied the principle of collateral estoppel to subsequent trials, have undercut the rationale for the decision in *Dunn*. That contention is without merit, for this Court has recently reaffirmed the rule of *Dunn* in *Hamling* v. *United States*, 418 U.S. 87, 101, and the concepts of *res judicata* and collateral estoppel have no application to the issue of inconsistent verdicts. See *United States* v. *Serlin*, 538 F.2d 737, 746-747 (C.A. 7); *United States* v. *Carbone*, 378 F.2d 420, 422-423 (C.A. 2), certiorari denied, 389 U.S. 914; *United States* v. *Greene*, 497 F.2d 1068, 1086 (C.A. 7), certiorari denied, 420 U.S. 909; *United States* v. *Zane*, 495 F.2d 683, 690 (C.A. 2), certiorari denied, 419 U.S. 895.

7. Nor is there any merit to petitioner Craig's claim (Pet. No. 77-1502, pp. 21-22) that he was prejudiced by reliance upon the first decision by the court

[12] North was convicted on three substantive mail fraud counts and acquitted on eight others. In addition, he was convicted of conspiracy to commit mail fraud.

below in his companion case (528 F.2d 773), holding that an evidentiary privilege was available to state legislators but could be waived. The instant trial was completed prior to the time that the court of appeals held, on rehearing *en banc*, that there was no federal common-law legislative privilege (537 F.2d 957). Craig argues that, had he anticipated this holding, he would have offered a different defense at trial. Since references in the indictment to legislative acts were deleted prior to trial, and since Craig was well aware that he could be prosecuted for fraud and corruption without an explicit showing of legislative acts (*United States* v. *Brewster*, 408 U.S. 508), it is difficult to understand how he could have been misled. He certainly has demonstrated no prejudice and merely speculates that he might have conducted his defense differently. As the court below recognized, however, the decision whether to testify in his own behalf was a strategy decision on Craig's part (Pet. App. 115); he sought to gain a tactical advantage and should not now be heard to complain because his strategy failed. See, *e.g.*, *United States* v. *Marcello*, 423 F.2d 993, 1004-1005 (C.A. 5), certiorari denied, 398 U.S. 959; *Bayless* v. *United States*, 381 F.2d 67, 75 (C.A. 9).

8. Finally, petitioner Pappas urges (Pet. No. 77-1501, pp. 39-42) this Court to exercise its supervisory powers and reverse his conviction because co-defendant Course's perjury indictment was consolidated for trial with petitioners' indictment for the cement bill

scheme.[13] Pappas argues that introduction of evidence on the perjury count against Course tainted the prosecution against the other defendants (Pet. No. 77-1501, pp. 41-42).[14] The perjury occurred during Course's testimony before the grand jury investigating the fraudulent scheme involved in this litigation; the commonality of the two offenses made joinder permissible as to Course. See *United States* v. *Pacente*, 503 F.2d 543, 545-546 (C.A. 7) (*en banc*), certiorari denied, 419 U.S. 1048; *United States* v. *Carson*, 464 F.2d 424, 436 (C.A. 2), certiorari denied, 409 U.S. 949; *United States* v. *Sweig*, 441 F.2d 114, 118-119 (C.A. 2), certiorari denied, 403 U.S. 932. Even if the joinder were improper as to Course, it is difficult to understand how the co-defendants could have been prejudiced, particularly when the trial court instructed the jury that the evidence as to Course's alleged perjury did not have any applicability to the other defendants (Tr. 2135-2136).

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[13] Walker and North apparently join in this contention. See Pet. No. 77-1499, p. 2; Pet. No. 77-1500, p. 19. Petitioners did not raise this issue in the court of appeals, although it was raised in pre-trial motions.

[14] Course was convicted on the perjury count as well as the mail fraud and travel act counts, but he died while the appeal was pending below.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1977

FRANK P. NORTH, JR., *Petitioner,*

vs.

UNITED STATES OF AMERICA,

JACK E. WALKER, *Petitioner,*

vs.

UNITED STATES OF AMERICA,

PETER V. PAPPAS, *Petitioner,*

vs.

UNITED STATES OF AMERICA,

ROBERT CRAIG, *Petitioner,*

vs.

UNITED STATES OF AMERICA,

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONERS PAPPAS AND CRAIG TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

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To: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States

Petitioner Peter V. Pappas, and Petitioner Robert Craig, Defendants-Appellants in the Court below, submit this Re-

ply Brief to the Brief of the United States in Opposition to the Petitions For Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.*

OPINIONS BELOW

The Opinions of the Seventh Circuit, and other lower court Orders and Opinions are not yet reported, but are printed in the Joint Appendix filed by the Petitioners.

JURISDICTION

The decision of the Court of Appeals for the Seventh Circuit was filed December 12th, 1977, and is set forth in the Joint Appendix (App. D, pp. 59-151) The Motion for Re-Hearing En Banc was filed December 27th, 1977, and ultimately denied on March 21st, 1977. (App. E, p. 152) This Petition is filed within 30 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1524 (1).

Jurisdiction as to *Craig and Markert* v. *United States*, 77-1504, is similarly invoked under 28 U.S.A. 1524(1), and is likewise pending before this Court.

The Government Brief In Opposition was filed June 12th, 1978, and Petitioners' Reply thereto is filed instanter.

QUESTIONS PRESENTED FOR REVIEW

Petitioner Pappas submitted Questions for Review in Petition 77-1501.

Petitioner Craig submitted Questions for Review in Petition 77-1502, and in companion Petition 77-1504.

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* Also affected by this Reply Brief, is *Markert and Craig* v. *United States*, 77-1504, cert. pending.

Both Petitioners adopted other Questions submitted by Petitioner North's 77-1499, and by Petitioner Walker's 77-1500.

The Government Brief has restated those questions but in a more generalized and capsulized version.

The Petitioners incorporate by reference, their original Questions as presented by all Petitioners in the original Petitions (77-1499, 77-1500, 77-1501, 77-1502 and 77-1504).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, Section 12, Illinois State Constitution of 1970; Smith-Hurd Illinois Annotated Statutes.

> ". . . A member (of the General Assembly) shall not be held to answer before any other tribunals for any speech or debate, written or oral, in either house. These immunities shall apply to committee and legislative commission proceedings."

Constitution of the United States, Amendment IV:

> The right of the people to be *secure* in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . .

Constitution of the United States, Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

Constitution of the United States, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

Constitution of the United States, Amendment X:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States,

are reserved to the States respectively, or to the people.

Title 18, United States Code, Section 1951

§ 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point

outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45. June 25, 1948, c. 645, 62 Stat. 793.

Title 18, *United States Code, Section* 1341

§ 1341 Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

As amended Aug. 12, 1970, Pub.L. 91-375 § 6(j) (11), 84 Stat. 778.

Rule 501, *Federal Rules of Evidence*

Rule 501. General Rule

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to

statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1933.

Rule 1101(*b*) *&* (*c*), *Federal Rules of Evidence*

Rule 1101. Applicability of Rules

* * *

(b) Proceedings generally. These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under the Bankruptcy Act.

(c) Rule of privilege. The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.

STATEMENT

A. Statement of the Case.

Petitioners Pappas and Craig,[1] have related how this Case reached this Court, from the Trial Court and the Seventh Circuit below.

The Government likewise has so advised the Court, and there is no variance in those respective statements.[2]

[1] Pappas Pet. 77-1501, pp. 4-6. Craig Pet. 77-1501, pp. 9-12 and 77-1504.

[2] Gov. Br., p. 3.

B. Evidentiary Statements.

Petitioner Pappas set forth only evidence relating to the Tapes of "Consensual" Conversations, at various and appropriate places in his Petition, 77-1501.

Petitioner Craig set forth *Facts* relevant to this Petition, as to the Mailings, the Travel Counts, and the Electronic Recordings.[3]

The Government found no objections in Petitioners' review of the evidence, but in its brief, the Government has given its version of the evidence.[4] Their version does not cite supporting references to the Record, as was done by the Pappas and Craig statements. Petitioners further note misstatements by the Government's version. Since this Petition poses legal issues, the Court should not now be burdened with unravelling the Government's new version.

Petitioners respectfully rest with the evidentiary statements they have submitted.

PETITIONERS REPLY TO THE GOVERNMENT'S BRIEF IN OPPOSITION

Petitioners Pappas and Craig, in their Reply to the Government's Brief, refer directly to their own Questions and to their own Reasons, citing the same numbers thereof as in their Petitions, but cross-reference the same with the Government's arguments.

1. The "Legislative" Documents and "Legislative" Evidence were not admissible.[5]

The respondent misapprehends. Petitioner Markert has, in the past, questioned the intent of Congress relative to

[3] Craig Pet. 77-1502, pp. 12-15.

[4] Gov. Br. pp. 4-9.

[5] Pappas Pet. 77-1501, p. 8. Craig Pet. 77-1502, p. 18, and Pet. 77-1504, pp. 14-27.

employing criminal statutes of general application to State legislators—if a state legislative immunity or privilege is recognized. But—with the evolution of time and the devolution, by the government, of this important question to an evidentiary question, and the acquiescence of even the favorable courts therein, the question has resolved itself to a single inquiry of whether such a privilege exists in the common law, giving state legislators the same protection that surrounds our United States Representatives. We ask no more than was given in *Gravel* (*Gravel* v. *United States*, 408 U.S. 606).

Therefore, the Solicitor errs when he begins his resistance by a contention that we argue for immunity from prosecution (See Solicitor's Opposition, p. 5).

We ask a more singular question, and, the question is whether the common law legislative privilege exists and is mandated by Rule 501, Federal Rules of Evidence. An even more basic, but relevant question is whether this is a federalistic, or nationalistic, form of government. If it is the latter, the demise of the States is forseeable.

The Solicitor demeans the conflict existing between this and the Third Circuit, espousing the analysis of the dissent[6] that the Third Circuit was speaking in *dictum*.[7]

This is pure sophistry. The Third Circuit expressly denounced the reasoning of the Seventh Circuit.

The question is recognized and unresolved. Its impact is widespread and growing, not only in criminal proceed-

[6] Judge Gibbons, *In Re Grand Jury Proceedings* 563 F. 2d 577, at 585.

[7] We hear no recognition of the three judges who dissented in the Seventh Circuit.

ings by indictment, but by Grand Jury inquiry. We submit it is ripe for resolution.

The Third Circuit opinion was never appealed and still stands, and in that case, the Court affirmed the trial court suppression of certain "legislative actions", and further supported the common law privilege of immunity for state legislators as applicable in federal criminal proceedings, (563 F.2d at 583) and that this ". . . privilege is not one of nondisclosure but of nonevidentiary use." (563 F.2d at 584)[8]

Petitioners have pointed to the conflict in this area between the Circuits—between the Third and the Fifth on one hand, and the Seventh on the other. This conflict should now be resolved by this Court as to this important and viable question affecting federal-state relationships.

2. There was an over-extension of Federal Jurisdiction in this Case.[9]

A. Mail Fraud Counts. (18 USC 1341)

The Government opposes the Petition, but ignores the Record and Petitioners' arguments.

Neither Petitioner Craig, nor Petitioner Pappas placed any document in the mail, nor received any document in the mail. Moreover, as to Petitioner Pappas, Count 2 of

[8] In *DiCarlo* v. *United States*, 77-990, in opposition, the Solicitor argued (p. 13) that the Government "did not seek rehearing en banc because the judgment was favorable." The panel decision in *Markert* (528 F.2d 733 and Joint App. 21-43) was also favorable to the Government, also finding waiver, but the Government enthusiastically sought re-hearing en banc and got it. The vagrant ideologies conflict.

[9] Question #1 from 77-1501, p. 8-12, and Questions #s 1 and 2, Walker 77-1500, and Questions #s 3 and 4, Craig 77-1502.

the Indictment (R. 1) did not name him as a "co-schemer", and the Government has insisted that all the mailings in this case were ". . . either placed in the mail by a co-schemer, or mailed to a co-schemer or both."[10]

If Petitioners are to be charged with abuse of the Mails, then some other basis must be shown to invoke federal jurisdiction.

This Court has held that the mails must be used ". . . as a central necessary instrumentality in the perpetration . . ." of the scheme, and must play in indispensable role. *United States* v. *Maze*, 414 U.S. at 408-9. Though the Solicitor concedes that the mailings must be ". . . for the purpose of executing the scheme",[11] he argues that ". . . it is not necessary that the scheme specifically contemplate the use of the mails; it is sufficient if the mailings were *incident to an essential part of the scheme*". (emphasis added.)[12]

Judge Swygert, in dissenting below, succinctly stated:

> "This test standing alone, is wholly insufficient. It leaves out the necessary causal relation. Any mailing can be incidental to the scheme; yet it may not further its execution . . . The mailing must be essential to the execution or furtherance of the scheme."[13], and ". . . the record is completely bare of evidence that any of the defendants or their co-schemers contemplated, agreed or intended to use the mails to further the execution of their scheme to defraud the citizens of Illinois."[14]

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[10] Gov. Br. to the 7th Circ., pp. 77-8.

[11] Gov. Br. p. 11.

[12] Gov. Br. p. 11.

[13] Joint App. D, p. 131.

[14] Joint App. D, p. 142.

B. The Travel Count (18 U.S.C. 1952)

Petitioners argued that this interstate trip by Lauwereins was fortuitous, unforeseen, not contemplated by anyone else other than Lauwereins, that it was neither essential nor necessary for the purposes of the alleged scheme to raise the $50,000 fund, and that Lauwereins made this trip on his own, for some undisclosed purpose of his own.[15]

In *Opposition*, the Government asserts improperly, that:

> "Indeed the trip was viewed by the conspirators as an 'important episode' in the fund raising campaign. *Ibid*", referring to Joint Appendix pp. 111-112, a portion of the majority below; and "Here, the interstate travel was both planned and undertaken to achieve an essential step in the fraudulent scheme".[16]

The Record in this case refutes the Government stand, since it is clear from the Evidence, that:

1. There was *no* evidence that Lauwereins was directed by *anyone else* to make this trip.
2. There was *no* evidence that Lauwereins reported to *anyone else* before or after he made that trip.
3. None of his Chicagoland co-conspirators or cohorts ever knew about the trip.
4. The $50,000 fund was raised entirely from Chicago area ready-mix executives, and their formula never contemplated application to the down-state group. ($40 per Chicagoland ready-mix truck).

This one trip was so minimal, incidental, fortuitous and peripheral, that it was error to submit the Travel Counts to the jury. *United States* v. *Isaacs*, 493 F. 2d 1124(7th C.), cert. denied, 417 U.S. 976 (1974).

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[15] Pet. 77-1501, p. 10-12. Craig Pet. 77-1502, p. 15.

[16] Gov. Br. at p. 14.

3. The Tapes of the "Consensual" Conversations Were Inadmissible.[17]

The Government does not object to the evidentiary statements of the Petitioners. In opposition, the Government generally relies upon the majority below, and fails to overcome Petitioners' various grounds for suppressing these tapes.

A. The Original Tapes and Reels Were Not Marked.

The Government concedes this.

B. The Original Tapes were Never Under "Seal" and Secured.

The Government concedes this, but contends that there was no statutory ". . . error in the failure to present the tapes to the district court for sealing".[18]

This begs the question, this lack of "seals", the lack of markings, and the lack of any "chain of custody" linking the original tapes to the tapes presented in Court, certainly supports inadmissibility.

C. The "Chain of Custody" of the Original Tapes Was Never Established, and There Was No Direct or Even Indirect Link Between the Original Tapes Released by Pete Pappas to D'Hooge and those "O" Tapes Presented in Court.[19]

The Government concedes that a "chain of custody" was never established but urges that the tapes presented in Court were in the same condition as when received by the

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[17] Pappas Pet. 77-1501, pp. 12-36; Craig Pet. 77-1502, pp. 18-20; Walker Pet. 77-1500, pp. 17-18.

[18] Gov. Br. p. 19, citing 18 U.S.C. 2518 (a)(3).

[19] Pet. 77-1501, at pp. 19-23.

Government. They cite the Pete Pappas testimony that ". . . the tapes accurately reflected such conversations."[20]

Pete Pappas however, listened in 1976, to *copies* of the "O" tapes, purportedly made in 1973, and his testimony did not link the *copies* he heard, to the original tapes.[21]

Then the Government cites the testimony of Professor Wells, that the "O" series he had examined, ". . . had not been altered".[22] This conveniently ignores Weiss' further testimony that he, Weiss, did not know whether he had examined the *original* tapes—or mere *copies*, and he conceded that if he had in fact examined only *copies*, that he could not state or determine whether the *originals* had or had not been tampered with.[23]

The Government has failed to connect or link the tapes presented in Court in 1976, with those made in 1973, and further failed to prove that the *originals* had not been tampered with. Nor is there yet, proof that the originals were ever presented in court.

E. The Electronic Surveillances in This Case Were an Abuse of or Were an Unreasonable Search or Seizure, And a Violation of the Fourth Amendment.[24]

1. In Opposition, the Government argues that the Petitioners have no legitimate 4th Amendment interest,[25] and

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[20] Gov. Br. p. 8.

[21] Pappas Pet. 77-1501, pp. 19-22, that either D'Hooge or his attorney Winstein had the original tapes.

[22] Gov. Br. pp. 18-19.

[23] Trans. pp. 1198-2020.

[24] Pappas Pet. 77-1501, pp. 23-27; Walker Pet. 77-1500, pp. 17-18. Craig adopted this argument and reason.

[25] Gov. Br. at pp. 19-20.

assert that they are not afforded any such protection because as "wrongdoers"—they had a ". . . misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." citing *Hoffa* and *White*.[26]

Neither *Hoffa* nor *White* as cited, apply here. In *Hoffa*, Partin overheard Hoffa's words, and he related them in court. In *White*, Jackson overheard White's words and he related them in court. Moreover, there were no tapes played in either case.

Here, Pete Pappas did *not* relate the conversations in court. Rather, the tapes were played instead. Nor did the tapes *corroborate*, and thus they did not come under *Lopez*.[27]

2. The Government ignored the conflict in *White*, as noted by this Petitioner.[28] Is *On Lee* viable? Or, was it too overturned by *Katz*?

In *White*, the majority held that *Katz* could not be applied retroactively. One plurality then urged that *On Lee* was viable, whereas another plurality contended that *Katz* effectively overruled *On Lee*, just as it had specifically overruled *Olmstead* and *Goldman*.[29]

[26] *Hoffa* v. *United States*, 385 U.S. 293, 302; *United States* v. *White*, 401 U.S. 745, 749.

[27] *Lopez* v. *United States*, 373 U.S. 427 (1963).

[28] Pappas Pet. 77-1501, pp. 26-27.

[29] *United States* v. *White*, 401 U.S. 745 (1971); *On Lee* v. *United States*, 343 U.S. 747 (1952); *Katz* v. *United States*, 389 U.S. 347 (1967); *Olmstead* v. *United States*, 277 U.S. 438 (1927); *Goldman* v. *United States*, 316 U.S. 129 (1942).

This Court now has the opportunity to resolve this issue, and we submit that this Court's rulings in *Katz* supersede *On Lee*.

F. These Interceptions Were Not "Consensual" Because Pete Pappas Did not Give, in Advance, His "Prior Consent".[30]

The Government misstates in a footnote the effect of *Bynum* and *Smith* v. *Wunker*[31]—by suggesting that those two cases *merely* hold that there was no "interception" within 18 U S C 2511(2)(c).

That footnote tells only half the story—since it held that because there was no "prior consent", there was no "interception", and that the tapes were *not admissible*.[32]

Here, Pete Pappas gave his "consent" *only* subsequently. Under those two cases, the tapes here are likewise inadmissible.

G. These "Interceptions" Were Not Made "Under Color of Law".[33]

1. The Government misconstrues the Statute and misstates the contentions of the Petitioners.[34]

The Statute is clear—before "prior consent" can invoke

[30] Pappas Pet. 77-1501, pp. 27-29.

[31] Gov. Br. p. 17, fn 10.

[32] *United States* v. *Bynum*, 360 F. Supp. 400 (S.D. N.Y.), aff'd, 485 F. 2d 490 (C.A. 2nd); vacated on other grounds, 417 U.S. 903; *Smith* v. *Wunker*, 356 F. Supp. 44 (S.D. Ohio); and see Pappas Pet. 77-1501, pp. 27-29.

[33] Pappas Pet. 77-1501, pp. 30-33; Craig Pet. 77-1401, pp. 18-20.

[34] Gov. Br. p. 16.

the statutory exemption, the person granting that consent in advance, must also be "acting under color of law".[35]

Petitioners so contended in the Petitions.

2. The Government attempts to meet its burden of invoking the statute with its assertions that:

> ". . . Rep. Pappas was clearly cooperating with the government . . .", and ". . . a government agent (D'Hooge) set up the recording equipment . . . operated the equipment, and took custody of the tapes thereafter."[36]

"Co-operation" alone does not create "color of law". Adding the ingredient of use of government equipment and tapes and the technical assistance of an agent (D'Hooge) does not create "color of law". Pete Pappas remained a private person who taped only to protect *himself* from any charge of obstruction of justice[37] and, retained control over the *use* of the tapes until a later date, *after* he consummated his plea deal assuring him of favorable treatment of his criminality.[38]

3. The Government seeks to avoid the stringent requirements of 18 U S C 2511(2)(c), by now asserting, that "acting under color of law" is *not* required under 18 U S C 2511(2)(d),[39] that the tapes are thus admissible.

[35] 18 U.S.C. 2511(2)(c) reads as follows:
"It shall not be unlawful under this chapter for a person *acting under color of law* to *intercept* a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given *prior consent* to such interception." (emphasis added)

[36] Gov. Br. pp. 16-17. D'Hooge did take control of those original tapes, and the Record discloses that they were never seen again. Pappas Pet. 77-1501, pp. 19-21.

[37] Trans. pp. 62-4, Motions To Suppress.

[38] Trans. pp. 62-4, 95,331; R. 107, p. 6; Pappas Pet. 77-1504, pp. 19-21, 27-29.

The Government never made that assertion at the trial, and there relied entirely and only upon 18 U S C 2511(2)(c). Thus, this position is inappropriate now.

4. The Tapes Should Be Suppressed Because the Record Does Not Disclose Compliance by Government Attorneys With the Guidelines of the Attorney General Governing "Interceptions" Or The "Monitoring" of "Consensual" Conversations.[40]

The Government's contention of "waiver" ignores the inappropriate actions of the government attorneys during the trial, which in effect now estops the Government.

A Motion to Suppress was heard at the inception of this trial relative to the "consensual" overhearings. Then United States Attorney Samuel K. Skinner testified that he had not himself made any written request to his superiors (The Department of Justice) for authority to make the tapes (Tr. 473), but had enlisted a certain D'Hooge, a Postal Inspector, and that Postal Inspectors had followed the (postal) regulations concerning "consensual" tapings. (Tr. 453, 468, 472, 473) Petitioner Pappas, through his attorney, asked whether he might see the Postal Inspectors' "reports". The government trial attorney resisted on the ground that they were not "discoverable". The inquiry was not further pressed. "Non-discoverable" in the context in which it was used implied non-availability.

[39] Gov. Br. p. 17, fn 10.

[40] Pappas Pet. 77-1501, pp. 36-39. The question of exercise of this supervisory power is now before this Court in *United States* v. *Caceres*, 76-1309, cert. granted June 5th, 1978 to 545 F. 2d 1182 (9th C. Cal.) (1977).

In February, 1978, after the panel opinion in this cause was rendered, the petitioners herein asked for a rehearing to determine if in fact, the Guidelines of the Attorney General had been complied with. Petitioners learned, through the Freedom of Information Act, that Guidelines had been drawn by the Attorney General of the United States. It was at this time, that it was determined that the person in charge of the investigation, to wit, the Department of Justice, was required to get authorization, not the Postal Department, nor the Postal Service.[41] We now know that has not happened. We have also been advised through the Freedom of Information Act that Agent D'Hooge, whom the United States Attorney relied upon for compliance, was not even in fact a Postal employee, but rather was an Internal Revenue Agent.[42]

On Petition for Rehearing or Rehearing En Banc, the government protested that, in believing the testimony of the United States Attorney, rather than pursuing the matter further, the defendant had waived. In other words, the petitioners were obliged to *presume* that the United States Attorney lied; that Postal authority was not sufficient; that Agent D'Hooge, presented as a Postal Inspector, was in fact an inspector from another agency. The Petitioners onus was to disbelieve everything that was uttered by an attorney for the United States, an attorney and officer of the United States District Court, the representation for Agent D'Hooge that he was employed by the Postal Service, not the Internal Revenue Service.

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[41] The Guidelines are in Appendix G as implemented by Appendix H. Pappas Pet. 77-1504, App. 1-4. The U. S. Attorney at Chicago headed this investigation. (Trans. p. 473).

[42] The Record does not disclose effect of the Guidelines upon D'Hooge as an employee of the Internal Revenue Service, nor compliance by the Internal Revenue Service.

Though judicial proceedings are conducted generally on mutual respect for the representations of counsel—it is the present argument of the Solicitor that representations of the trial attorney for the United States must be deemed suspect, and the plumbing of those suspected untruths devolve upon defense counsel opposing the government, and that their failure to probe deeply to unearth the truth underlying government false representations results in *waiver*. Yet, the Solicitor's next argument will be an urging to rely upon official regularity. We do not contemplate that this or any other Court will accept such contentions.

We submit that any misrepresentation by any attorney, upon which his opposition relied, would call for the most severe sanction. We submit further that the United States Attorney for the Northern District of Illinois testified under a misapprehension not only of his own duties but of the capacity of the persons assisting him. The alternative is obstruction of justice—a felony. It is our expectation that the Solicitor General does not embrace the latter alternative.

5. The Erroneous Consolidation of the Mail Fraud Indictment with the Perjury Indictment Was Improper.

Petitioners urge this Court to exercise its supervisory powers to reverse the Trial Court's improper consolidation and joinder.[43]

The Government contends that:

> "Even if the joinder were improper as to Course, it is difficult to understand how the co-defendants could have been prejudiced, particularly when the trial court instructed the jury that the evidence as to Course's alleged perjury did not have any applicability to the other defendants."[44]

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[43] Pappas Pet. 77-1501, pp. 39-42.

[44] Gov. Br. p. 24.

It is clear, that Course's testimony was tainted because the petit Jury knew that Course had lied to the Grand Jury. That testimony in turn tainted the defense of the other defendants as well as Course—that there had not been any bribery—that only campaign funds were involved.

It is naive to assume that the prejudicial effects of that known perjury would be overcome by any charge to the petit jury. We noted Judge Learned Hand's admonition that this posed a psychological feat beyond the powers of the jury.[45]

CONCLUSION

Wherefore, for the reasons stated in the Petitions and in the Reply Brief submitted here, the Petitioners respectfully pray that this Court issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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[45] Pappas Pet. 77-1501, p. 42. citing *Nash* v. *United States*, 54 F. 2d 1006, 1007, 352 U.S. at 247 and p. 39, citing *United States* v. *Jacobs, cert. granted*, 77-1913 where this same question is on review.

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